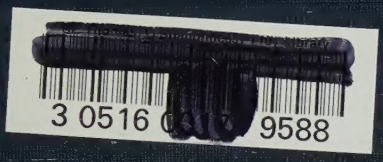
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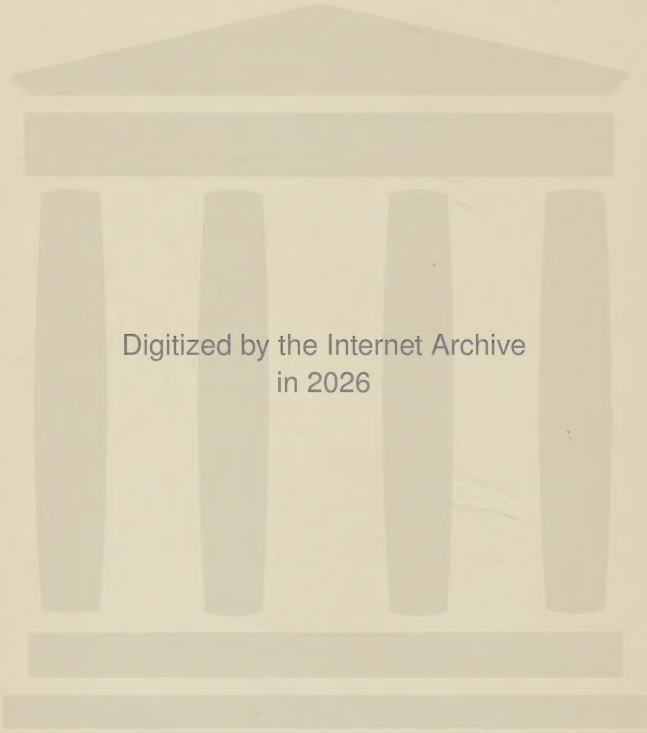

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LEGISLATIVE PROCEDURE

PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES

BY

ROBERT LUCE, A.M.

A Member of the General Court of Massachusetts for nine years; of the Governor's Council, as Lieutenant-Governor; of a Constitutional Convention; and of the Congress of the United States

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LEGISLATIVE PROCEDURE

LEGISLATIVE PROCEDURE

* * *

CHAPTER I

PARLIAMENTARY LAW

Lawmakers must themselves be governed by law, else they would in confusion worse confounded quickly come to grief. History has given us one striking example of what befalls lawless lawmakers and of the harm they may do. It is agreed that "the bad mode of deliberating" by the National Assembly was one of the chief causes leading to the catastrophes of the French Revolution. A hundred members might be seen trying to address the House at the same time. The authority of the President was wholly disregarded. Spectators applauded or hissed at pleasure. No rules were observed in the conduct of business. Sir Samuel Romilly, deeply sympathetic, had prepared a statement of the practice of the House of Commons, and Mirabeau had translated it into French. It was ignored. "Much of the violence which prevailed in the Assembly," says Sir Samuel, "would have been allayed, and many rash measures unquestionably prevented, if their proceedings had been conducted with order and regularity. If one single rule had been adopted, namely that every motion should be reduced to writing in the form of a proposition before it was put from the chair, instead of proceeding as was their constant course by first resolving the principle as they called it (décréter le principe) and leaving the drawing up what they had so resolved (or, as they called it, la rédaction) for a subsequent operation, it is astonishing how great an influence it would have had on their debates and on their measures. When I was afterwards present and witnessed their proceedings, I had often occasion to lament that the trouble I had taken had been of no avail." [1]

The French disaster and episodes similar in character if not in the horror of their results, have in other assemblies of Continental Europe, as well as in the kaleidoscopic republics of Central

[1] W. E. Hearn, *The Government of England*, 547.

and South America, shown to English-speaking peoples the breadth and depth of their good fortune in developing a priceless system of parliamentary law. To it we owe in measure little realized the liberty we deem so precious. By means of it our civilization makes progress that is healthy and safe.

Edward Everett said in the United States Senate, December 8, 1853: "There is nothing which so distinguishes the great national race to which we belong, as its aptitude for government by deliberative assemblies: its willingness, while it asserts the largest liberty of parliamentary right, to respect what the Senator from Virginia, in another connection, has called the self-imposed restrictions of parliamentary order; and I do not think it an exaggeration to say that there is no trait in their character which has proved more conducive to the dispatch of the public business, to the freedom of debate, to the honor of the country — I will say even which has done more to establish and perpetuate constitutional liberty."

Did Everett too much extol a framework of rules, a scaffolding of practices? Shall Parliamentary Law be spoken of in the same breath with Magna Carta, the Bill of Rights, the Declaration of Independence? Are its principles to be likened in importance to those of the common law or of equity jurisprudence?

It is true that with Coke and Blackstone and Kent we do not ordinarily class Hatsell and Cushing and Hinds. It is true that the literature of parliamentary law is scanty and that it deals with minutiæ of seemingly little consequence to human rights. Yet think what the law and the practice of legislative assemblies really mean. They make it possible under a representative form of government for the will of the people to be ascertained. Starting with the assumption that this will is the will of the majority, we can give it expression and effect only by processes that at the same time endow it with form and win submission by the minority. Lacking either achievement, chaos follows.

Accurate expression of the majority will is only to be secured by adequate debate, conducted with freedom enough to permit every useful contribution of ideas and opinions, and with deliberation enough to exclude as far as practicable the untoward influences of precipitancy and passion. To this end there must be different stages of consideration and then opportunity for reconsideration. There must be protection against surprise and against fraud. A conclusion must be reached. Somebody must

preside and the others must not be at the mercy of his caprice. Due order must be followed in the transaction of business. Decorum must be maintained. Dignity must clothe the conduct of affairs if decisions are to command the respect of the people.

For these purposes rules are necessary. It would be most dangerous to rely on the inspiration of the moment for standards of conduct. The individual in the daily affairs of life finds the observance of a myriad conventions necessary for his convenience and safety. Much more is this important in assemblies. The psychologists have scientifically established, what is well known to every man with eyes in his head, that men in the mass are capable of sentiments, are subject to emotions, are swayed by passions, which exaggerate the weaknesses as well as the virtues of human nature. Unless codes of conduct have been agreed upon before the clouds appear on the horizon, every gust will threaten to wreck the ship. The nature of these codes is the minor matter. It is but repeating Hatsell and Jefferson and Cushing to say, it is more material there should be a rule to go by than what that rule is. In the words of Hatsell (II, 150) "if the maxim, 'Stare super vias antiquas,' has ever any weight, it is in those matters, where it is not so material, that the rule should be established on the foundation of sound reason and argument, as it is, that order, decency, and regularity, should be preserved in a large, a numerous, and consequently oftentimes a tumultuous assembly."

That this rule has won universal acceptance is shown by a remarkable phenomenon of which those who share in it are for the most part wholly unconscious. There is no rule of parliamentary law and no special rule adopted by a legislative body at the beginning of a session that could not at any time be disregarded by a majority without invalidating any resultant law. Barring constitutional obstacles, no court would ever question a statute because such a rule had been disregarded. Suppose an agreement that this or that action shall be taken only by a two-thirds or a unanimous vote, and then it is taken by a majority vote. No court will issue a writ of injunction or mandamus or any other kind of a writ by reason thereof. The principle has been laid down repeatedly.[1] "The courts cannot declare an act of the

[1] Sweitzer *v.* Territory, 5 Okla. 297 (1897). Also see People *v.* Hatch, 33 Ill. 9 (1863); State *v.* Brown, 33 S.C. 151 (1890); St. Louis Ry. Co. *v.* Gill, 54 Ark. 101 (1891); Cook *v.* State, 26 Ind. App. 278 (1901); Manigault *v.* Ward, 123 Fed. Rep. 707 (1903).

Legislature void on account of non-compliance with rules of procedure made by itself to govern its deliberations."

One case may be thought to be the contrary — People *v.* Devlin, 33 N.Y. 268 (1865). A bill that had passed both Houses and been sent to the Governor was recalled by the Assembly, which thereupon tried to strike out one section. The Senate refused to concur in this action and before the two branches could reconcile their differences, the Legislature adjourned. Thereupon the Governor signed the original bill. Was it valid? The Supreme Court held it was, on the ground that a bill passed by the two Houses and sent to the Governor could not be recalled except by joint action of the two Houses, and that action on a bill sent back upon the request of one only was a nullity. There was no evidence of compliance by the Assembly with its rule that a motion for reconsideration must be made on the same or the following day. When they have rules to govern themselves in the various stages of legislation, said Justice Potter, "and they have thus become the law, they cannot themselves arbitrarily depart from such law, and conduct their proceedings by other rules, not known to or adopted by such body." If he meant that legislative rules by their adoption had "become the law" of the land, his opinion may be respectfully doubted. One branch of a Legislature cannot make law by itself, nor can both branches in concurrence, but without the approval of the Executive, unless by the vote that may be necessary to override a veto.

He went on to say: "Though acts of the Legislature, signed by the Governor, not in conflict with the Constitution, may be omnipotent in this regard, to overcome violations of parliamentary law, in producing their passage, it is quite clear, that anything short of an act of the Legislature can work no such effect as to legalize a breach of the rules." On the contrary, nothing of the sort is quite clear. A breach of legislative rules is not unlawful in the sense of exposing its perpetrators to the possibility of coercion by legal processes or of penalty, and to say that it can be "legalized" seems to me a misuse of terms. In the case of the statute in question the completed action of the two Houses and the transmittal of the bill to the Governor, was enough to warrant him in signing, regardless of his having let the bill go out of his hands temporarily at the request of the Assembly.

If, then, we are to take the validity of enacted law as the test

(always barring constitutional defects), the rules of any Legislature or Congress are nothing but a "gentleman's agreement," wholly dependent on the good faith of the participants. Yet nobody ever thinks of transgressing such agreements except by the methods the agreements themselves prescribe or by unanimous consent. What stronger proof could be given of the universal consciousness of their importance?

Herein lies the safety of the minority, and this it is that makes parliamentary law and procedure of the greatest consequence to the public safety. Government survives because the lesser part yields to the greater part. Teutonic peoples have had more success than others in self-government because with them the minority, however convinced of its own wisdom, consents to be ruled by the majority until in orderly fashion the minority can make itself the majority. The minority insist on only the right to be heard. Theirs is the cry of Themistocles to Eurybiades — "Strike, but hear me!" Give them but the chance to present their arguments, fairly, fully, and they will abide the issue. This is what we call liberty, though just why it would be hard to tell.

Francis Lieber dwelt on that aspect of the matter in two of his books. In one he said: "Parliamentary practice, or rules of proceeding and debate, such as have been developed by England, independently of the executive, and, like the rest of the common law, been carried over to our soil, form a most essential part of our Anglican constitutional, parliamentary liberty. This practice, as we call it for brevity's sake, is not only one of the highest importance for legislatures themselves, but serves as an element of freedom all over the country, in every meeting, small or large, primary or not. It is an important guarantee of liberty, because it serves like the well-worn and banked bed of a river, which receives the waters that, without it, would either lose their force and use by spreading over plains, or become ruinous by their impetuosity when meeting with obstruction. Every other nation of antiquity and modern times has severely suffered from not having a parliamentary practice such as the Anglican race possesses, and no one familiar with history and the many attempts to establish liberty on the continent of Europe and in South America can help observing how essentially important that practice is to us, and how it serves to ease liberty, if we may say so." [1] And in the other: "The American or English reader, brought up

[1] *On Civil Liberty and Self-Government*, 189.

almost from early youth in an acquaintance with, and in many respects even under the influence of, the parliamentary law and usage — for it extends to our very schools — considers many things indeed most natural and hardly worth reflection which nevertheless required ages to become acknowledged, and for want of which civil liberty, or at least the expedition of the common business, could not prosper. All usages and laws which relate to debating . . . are of essential importance to liberty itself, and they must be considered as one of the safeguards of liberty which we possess in advance of the ancients." [1]

Eminent men have looked at the matter from much the same point of view when emphasizing protection as the chief purpose. Note, for example, a particularly eloquent panegyric by Joseph Story, spoken on leaving the Speaker's chair of the Massachusetts House of Representatives to take his seat on the Supreme Bench of the United States. "Cheered, indeed, by your kindness," he said, "I have been able, in controversies marked with peculiar political zeal, to appreciate the excellence of those established rules which invite liberal discussions, but define the boundary of right, and check the intemperance of debate. I have learned, that the rigid enforcement of these rules, while it enables the majority to mature their measures with wisdom and dignity, is the only barrier to the rights of the minority against the encroachments of power and ambition. If any thing can restrain the impetuosity of triumph, or the vehemence of opposition — if any thing can awaken the glow of oratory, and the spirit of virtue — if any thing can preserve the courtesy of generous minds amidst the rivalries and jealousies of contending parties, it will be found in the protection with which these rules encircle and shield every member of the legislative body. Permit me, therefore, with the sincerity of a parting friend, earnestly to recommend to your attention a steady adherence to these venerable usages." [2]

Observe the same keynote in sentences from a speech delivered by a statesman of our own time, Elihu Root, in the Senate of the United States, February 15, 1915. "The purpose of rules," he said, "is to establish a course of conduct which shall be a protection to the minority and preserve them in the performance of their duties against arbitrary repression on the part of the major-

[1] *Manual of Political Ethics*, 2d ed., II, 227, note.
[2] *Life and Letters of Joseph Story*, I, 203.

ity . . . The functions of the minority are as important to the preservation of representative government as are the functions of the majority. It is the duty of the minority to insist upon discussion, consideration, publicity, openness, to bring out and keep in the full sunlight of public knowledge the conduct of public business; and, sir, there is no right of liberty in a Republic more essential and vital than is the preservation and the protection of the minority in the performance of their duty. Otherwise, sir, why are we here at all? Why should not all of the members of the minority go to their homes? Why are we here through long days and nights inhaling poison, enfeebling our powers, shortening our lives? Why should not the resolution of the caucus have been brought into this Chamber and registered the day it was passed? Why have a vote? Why have any discussion if the rights of the majority are all that are to be considered; if the verdict of the majority must without let or hindrance, without postponement or discussion, except as a privilege, be registered as law? I say, sir, that unless the minority has rights which are to be protected, unless the minority is performing a public duty, why should not the edict of the caucus have been brought into this Chamber and registered as law? . . . Sir, the only protection for this system of government by representation is to be found in these rules. If you break the rules or ignore the rules and undertake to go on without them, then you cast aside the only protection for the real performance of the duties of a representative body against the arbitrary will of a majority, which is reached by agreement made outside of the Chamber."

Thomas Jefferson took the same view. Referring to Hatsell in the introductory words of his "Manual," he recalled that Mr. Onslow, the ablest among the Speakers of the House of Commons, used to say, "It was a maxim he had often heard when he was a young man, from old and experienced members, that nothing tended more to throw power into the hands of administration, and those who acted with the majority of the House of Commons, than a neglect of, or departure from, the rules of proceeding: that these forms, as instituted by our ancestors, operated as a check and control on the actions of the majority, and that they were, in many instances, a shelter and protection to the minority, against the attempts of power." So far, said Jefferson, the maxim is certainly true, and is founded in good sense, that as it is always in the power of the majority, by

their numbers, to stop any improper measures proposed on the part of their opponents, the only weapons by which the minority can defend themselves against similar attempts from those in power, are the forms and rules of proceeding which have been adopted as they were found necessary, from time to time, and are become the law of the House; by a strict adherence to which only the weaker party can be protected from those irregularities and abuses which these forms were intended to check, and which the wantonness of power is but too often apt to suggest to large and successful majorities.

Should Rules be Inviolable?

Such being the importance of parliamentary law and rules of procedure to all concerned, whether minority or majority, the question rises whether the desirability of action will ever justify their disregard. Here Hatsell spoke stoutly for precedent. "It is much safer," he declared, "to trust to time and to circumstances, which sooner or later dispose the minds of men to accept and approve of such propositions as are really for the public good, than to obtain even the best of bills by breaking down those bounds and fences which the wisdom of past ages has set up; and to let in disorders and confusions, which may finally prove fatal to the security, perhaps to the existence, of the constitution." [1]

The argument is weighty, but not wholly conclusive. There are times when the public welfare justifies evading the letter of rules. Were it not so, no excuse could be given for setting back the hands of clocks, creating fictitious legislative days, declaring summary adjournments, and like procedures found in practice to be salutary and not over-dangerous. Occasionally, too, an emergency demands drastic action. For an example, recall how that doughty statesman, John Quincy Adams, cut the Gordian knot in December, 1839, when five men came to Congress with regularly signed credentials, to face contests for their seats. On the issue depended the organization of the House, so closely were the parties divided. When the Clerk, calling the roll, came to the names of the five New Jersey men, he announced that he did not feel authorized to decide the dispute, and he would pass them by until the roll was finished. This made it impossible for the House to organize. Three days of wrangling followed. On the fourth it seemed as if everybody by common consent turned toward John

[1] *Hatsell's Precedents*, II, 164.

Quincy Adams to get them out of their dilemma. Reluctantly he accepted the responsibility, and offered a resolution that the Clerk call the names of the five members with regular credentials. But who was to put the question? The Clerk would not. Thereupon the old man seized authority by the bits and answered: "I intend to put the question myself." And he did. Afterward Wise of Virginia, among the most rabid of the Southerners who harried Adams by reason of his anti-slavery petitions, addressed a complimentary speech to him in which he said: "If, when you shall be gathered to your fathers, I were asked to select the words which in my judgment are calculated to give at once the best character of the man, I would inscribe on your tombstone this sentence, 'I will put the question myself.'" Morse, the biographer, shrewdly comments that doubtless Wise and a good many more would have been glad enough to put almost any epitaph on a monument for Mr. Adams.[1]

The story of a North Carolina episode may show how a Legislature sometimes works equity without disregard to the spirit of the rules. The North Carolina Constitution requires that bills shall be read three times in each House — a provision that would be useless were no interval to elapse between readings. A Register of Deeds had neglected to comply strictly with a law calling upon him to record marriage licenses and returns within ten days, under penalty of $200 for each neglect, the penalty to go to any prosecutor. He was sued for $12,000, whereupon he turned to the Legislature for relief. A member agreed with the Register's attorney, apparently without any money consideration, that if possible the bill should be passed through its several readings in one day, and sent to the Senate and passed on the following day, and that the plaintiff should have no time to be heard. Naturally the plaintiff, hoping to profit handsomely by getting an unconscionable advantage of the defendant, strenuously objected to being outwitted by this arrangement. So he took the case to the Supreme Court, which said that testimony on this point was properly rejected, for it was a matter between the Representative and his constituents.[2] It is to be doubted if his constituents felt aggrieved by his course.

On the whole, however, there can be no question that deviations from the beaten path should be few. By disregarding this,

[1] J. T. Morse, Jr., *John Quincy Adams*, 295.
[2] Bray *v.* Williams, 137 N.C. 387 (1905).

American Legislatures have brought on their own heads much of deserved criticism. Of all men those who make law should not break law. Yet the rules and even the Constitutions are so often ignored in some of our Legislatures that he who would describe their procedures is ever treading on very thin ice. What he reads may be the very reverse of the actual practice. For instance, when the printed page tells one that in Iowa no standing rule or order may be suspended in the Senate without a two-thirds vote, or in the House without a three-quarters vote, he might hope that Iowa makes it reasonably hard to turn aside from the normal course, but on inquiry he will find the obtaining of unanimous consent and the suspending of the rules are so common in the General Assembly of Iowa that few bills are passed in either branch without the use of one or the other of these methods of shortening the stages of procedure. Particularly common is said to be the suspension of the rule forbidding the third reading of a bill on the day of its first and second reading.

Whichever way you may turn, the same characteristically American disrespect for obstacles will make your conclusions uncertain. You will find readings in full turned into a farce, prescribed committee action made an idle formality, roll-calls abbreviated into jokes. Even Congress permits itself glaring fictions. For example, in 1877, during the pendency of the counting of the electoral vote, that body remained in session from February 1 to March 2 and the period was held to be but one legislative day. In that case the end may have justified the means, and anyhow it was a kind of fiction seldom harming anybody. No important rights can be impaired by lengthening the legislative day beyond twenty-four hours.

The opposite process, that of dividing the twenty-four hours into two or more periods and calling each a day rather than suspend or change the rules, is more dangerous, but sometimes excusable. The purpose of the rules concerned is to prevent surprise and to secure some interval between deliberations. In the last week of a session everybody is or ought to be on his guard and in constant attendance. It may, however, be argued that in any case the interval between deliberations should be secured, and something is to be said for the provision North Dakota put into her Constitution — "No legislative day shall be shorter than the natural day."

Yet cast-iron restrictions of this sort sometimes make serious

trouble. In the Massachusetts Convention of 1917 the last hour for putting proposed amendments on the ballot was approaching. If the rule requiring postponement of a motion to reconsider until the next day should be literally observed, an important amendment on which a large majority of the Convention wanted immediate action at the polls, might be delayed a year unless a costly special election were held. The creation of a special legislative day met the emergency, the Convention sustaining the presiding officer when a point of order was made by a former Governor who himself had been Speaker of the House. Theoretically the ex-Speaker was right, but there was ample precedent against him and the need was urgent. Less is to be said for many of the devices used in lawless Legislatures to push through the selfish schemes of tyrannical bosses, political buccaneers who batten on the public treasury, or ambitious partisans who play the autocrat for the sake of keeping their grip on power.

Constitutional and Other Restraints

It was with the mushroom growth of corporations after the invention of the steam locomotive that legislative rules began to seem too weak. Resort to constitutional restraints may have been natural, but it was unfortunate. The more the restraints, the more ingenious the expedients for evading them. Far wiser would it have been to build up the character of the Legislature than to put it in a strait-jacket. With the demoralization that followed the Civil War, reformers redoubled their efforts for artificial safeguards. The result was that a writer in the "Nation" of July 15, 1875, discussing recent constitutional changes, had some ground for saying: "We are so accustomed to the dishonesty of Legislatures that we do not think much about it, but we can get a glimpse of how it ought to look to us by reflecting on the tremendous change that would have to come over a country before constitutional checks like these could be imposed on the judiciary. Imagine a judiciary article, for instance, providing that no judgment or decree should be valid unless the judge should append to it a statement under oath that during the argument he had been continually present, that his attention had not wandered, that he had remained awake throughout all the discussions which had taken place, that citations of authorities contained in the decision were all genuine, and that it contained no perversion of law or fact." [1]

[1] "A New Kind of Veto," *The Nation*, July 15, 1875.

Legislatures have not yet freed themselves from the odium that in part caused, and in part was caused by, such treatment. They no longer deserve it, at any rate in such measure. Some never deserved it. Those of New England for the most part retained their self-respect. They were never galled by the shackles put on many other Legislatures. The devices and tricks and chicanery to which these shackles testify elsewhere were absolutely foreign to the spirit of, for instance, the Massachusetts General Court. The ethical standards of that body never would have permitted them. To-day its members cannot understand how they ever were permitted elsewhere. After twenty years of close acquaintance with lawmaking in Massachusetts, I can without reservation say I have seen, I have heard of, I have read of, no law enacted in that State in that time by fraud or foul play. My testimony may be open to the charge of prejudice. Let me buttress it with the judgment of an author from a distant State, L. G. McConachie, who says of Massachusetts: "Her General Court inherits the characteristics of the town meeting. By frequent amendment and revision she has kept her legislative procedure up to date, conserving and more perfectly securing those vital ideas of equality, order, fitness, and economy which shine in her early history. . . . Altogether there is probably not a legislative system among the forty-five more worthy of emulation than that of the old Bay State." [1]

If such praise is justified, it is in no small measure because of a respect for parliamentary law and an intelligence in the development of legislative processes that by their fruits attest their importance. The citizens of Massachusetts are no more honest, no more patriotic, than those of any other State. Their desire for good government is no greater than it is anywhere else. No American community wants anything but good government. The fault is not with the purpose, but with the means.

Is it not a pity that in so many communities so little thought is given to perfecting the machinery of government? Great indeed is the cause for regret that in these matters the States profit so little by each other's experience. In the course of preparing this book, and before that in trying to gather material on which to base suggestion for improvement of procedure in Legislatures of which I was a member, I have been forcibly impressed by the want of any comparative study of legislative processes.

[1] *Congressional Committees*, 366, 367.

Only by the merest accident does any member of the Massachusetts Legislature know anything about how any other Legislature works, wherein it is wiser, wherein it is less efficient. And only by labor beyond the time available to most legislators could he learn if he would. Here is an important opportunity for service, open to some organization that seeks the public advantage. It might begin wisely by preparing an Index Digest of legislative rules, along the same lines as those of the admirable Index Digest of State Constitutions prepared for the New York Constitutional Convention of 1915 by the Legislative Drafting Research Fund of Columbia University. Then it might usefully have all the Journals of the Legislatures scanned for such material as Hinds put into the seven mammoth volumes of the "Precedents of Congress." For a few of the States, notably Massachusetts, New York, Pennsylvania, Michigan, and Wisconsin, collections of the more important rulings by presiding officers have been made. These should be duplicated elsewhere.

Singularly little has yet been done in the way of historical research. The State Historical Society of Iowa has set a most commendable example by publishing a comprehensive treatise on "Statute Lawmaking in Iowa," a handsome book of 718 pages, edited by Benjamin F. Shambaugh, and made up of nine essays by eight different writers, giving a most thorough history and description of the legislative processes of the State. Were each of the other States to be made similarly fortunate, we should have the material for a comparative study of Legislatures that would be of great value and helpfulness. Legislative librarians in other States might usefully employ the time between sessions in cultivating the same field.

The need cannot, however, be wholly met by the study of books and documents, and it would be almost impossible to cover the ground by even the most thorough correspondence. Personal inspection of the workings of each Legislature in the land, by some keen observer who has himself served in a Legislature, would alone secure adequate results. The spirit of the thing, the unwritten customs so familiar to any one body that no member of it thinks they may be unfamiliar elsewhere, a thousand little matters, insignificant to an outsider not versed in the multitudinous detail of legislation, can be grasped and worked into a comparative study only by actual contact.

To illustrate the difficulties, take the excellent compendium on

the British Parliament by Sir Courtenay Ilbert, Clerk of the House of Commons, covering, no doubt he thought, every detail that would be helpful. Yet I could not find in it how far it is customary to vote upon amendments in connection with sections to which they relate. Since the plan of voting upon amendments all together at the end of the debate seems to me a vital weakness in the procedure of the Massachusetts General Court (which makes no use of the Committee of the Whole), I should have liked to find authority for supporting the opposite plan. Such illustrations might be multiplied indefinitely.

Usages and Precedents

Rules are the skeleton of procedure, usages are the flesh and blood. Usages are not officially set forth and are rarely described. They are constantly recognized, are ever changing, and can be learned only by experience. Parliamentary law had its origin in usages. Nobody knows when or how they came into being. From the earliest records of Parliament it may be gathered that some of them were then observed precisely as they are to-day. Others, we are told, are less easily discovered in the mediæval chronicles and rolls, and owe their reputation for antiquity to the fact that, when they make their appearance in later records, they have already assumed the prescriptive dignity of immemorial custom.[1]

Many usages were crystallized, so to speak, by the ruling of a Speaker or by some formal action of Parliament, such as a resolution or simple vote. New situations were met in the same way. Thus came what we call precedents. Out of these have been formulated much of what we call parliamentary law. Many of these precedents were gathered by John Hatsell, Clerk of the House of Commons for many years, who published in 1776 what he called "A Collection of Cases of Privilege of Parliament from the earliest Records to the Year 1628." In 1781 appeared the second volume, bringing the collection down to date, under the title of "Precedents of Proceedings in the House of Commons; with Observations." These volumes are referred to briefly as "Hatsell's Precedents." Up to 1832 Parliament was governed almost wholly by such customary law. Since then much modification has been made by enacted law — standing orders — what we call rules. Of about one hundred standing orders that regu-

[1] Stubbs's *Const. Hist. of England*, III, 375.

late the public business of the House of Commons, only three, dealing with finance, date from before 1832.

It was inevitable that just as the common law of England was taken over by her colonies, so the customary law of Parliament should be applied without essential change in their assemblies. Before the relations with the mother country had become too much embittered, there was frank acknowledgment of the situation. In the Journal of the Massachusetts House of Representatives for 1762–63 may be read: "We shall at all times think it our highest Honor and Happiness to make the Proceedings of the British Parliament our Example." When Revolution came, our ancestors tried to dispense with many things of British origin, but they were sagacious enough to make no attempt at change in this particular. On the contrary, when our first notable parliamentarian, Thomas Jefferson, set out to frame rules for the guidance of the Senate over which he was to preside by reason of being chosen Vice-President, he took them almost bodily from Hatsell, and did not hesitate to give due credit. "Jefferson's Manual" has ever since been the main authority for the Senate. It was adopted by the House in 1837. In both branches its rules to-day govern "in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders."

Upon the foundation that Jefferson laid, American presiding officers by their rulings, and lawmaking bodies by their usages and votes, have gradually built a structure that is now of no inconsiderable proportions. Luther Stearns Cushing, for a dozen years Clerk of the Massachusetts House of Representatives, then four years on the bench, and after that reporter to the Supreme Court, was the first to formulate the system into something like a code. In 1845 he published "Rules of Proceeding and Debate in Legislative Assemblies," and in 1856 a more elaborate work, the best of its kind, "Elements of the Law and Practice of Legislative Assemblies in the United States of America." The smaller book, now known as "Cushing's Manual," has had numerous editions, and has won wider recognition as authority than any other handbook. Of late years, however, several other books of the same character have competed with it for favor. The best known of them are Reed's, Crocker's, and Robert's, each having official approval in some of our Legislatures.

On the 19th of December, 1887, Samuel J. Randall, of Pennsylvania, had the floor of the House of Representatives at Washington when the Speaker informed him that his time had expired. To a member asking under what rule there was a limitation of time for debate, Speaker Carlisle replied: "The Chair has frequently decided that in the absence of a resolution adopting the rules of the House formally, the proceedings of the House are governed by the general parliamentary law, of which the practice of the House constitutes a part — *in fact, the principal part.*" Asher C. Hinds, long Clerk at the Speaker's Table and therefore the real parliamentarian of the House, put this practice into eight huge volumes entitled "Hinds's Precedents of the House of Representatives," published in 1907. They are a monument of untiring industry and a treasury of lore on the subject. For the Senate a like task has been performed within what is naturally much smaller compass, the volume compiled by Henry G. Gilfry, Chief Clerk of the Senate, published in 1914, being known as "Gilfry's Precedents."

It would seem as if in these collections would be something to meet every possible complication, that every emergency had by this time been anticipated. But just as the hundreds of volumes of law reports show as yet no signs of meeting all the daily needs of litigation, so there is no end in sight for the growth of parliamentary law. Somebody once computed that almost one third of the time of Congress was consumed on points of order, and that the controversy over them filled nearly one third of the pages of the costly and voluminous official record. This estimate was probably an exaggeration, and such a ratio is not now the case, but there is no doubt that questions of procedure make a great inroad on the time of all our legislative bodies.

Rules and Standing Orders

Rules or standing orders as well as constitutional provisions bear the same relation to parliamentary law that statutes bear to the common law. Except those that repeat familiar principles, they have no force beyond the body to which they are specifically made applicable. The standing orders of the House of Commons are by custom assumed to bind each successive House until changed. American practice is to the contrary. With our usual zeal for minute and detailed specification, and with over-much regard for machinery, we insist on drawing a sharp line between

successive Legislatures and Congresses, and compelling each in turn to go through at least the form of starting afresh. The National House of Representatives tried in 1860 to remove the occasion for biennial controversy by making the rules then adopted "the rules of that and succeeding Congresses unless otherwise ordered." The validity of this proceeding was questioned from time to time, but the rule was acquiesced in until 1890, when it was dropped from the code. Since then the old practice of having each House of Representatives adopt its own rules has been followed. The Federal Constitution says "each House may determine the rules of its proceedings." The State Constitutions usually say "shall" rather than "may," and what was probably at first meant as a mere authority has been commonly construed as a mandate to be observed independently on each occasion. In Nevada, however, the rules of the House specify that they shall govern succeeding sessions unless otherwise ordered.

To have been logical, sticklers for precision ought to have demurred at joint rules, that is, those adopted for the government of the two branches jointly. They are found, however, in all the State Legislatures as far as I have observed. The two Houses of Congress had joint rules until December, 1876, when the Senate declared them no longer in effect. Nevertheless the practice of the Houses has since been in accord with their directions.

The conception of what in England is usually called a standing order, and with us a rule, differs in the two countries. In England a standing order is a declaration of purpose that shall be subject to change at any moment. We hold that a rule has the element of compact, made in a season of calm deliberation against times of stress, and therefore not to be lightly changed. The standing orders of the House of Commons can be suspended by a simple majority vote. Notice of a motion for that purpose is usually required and given, but it may be dispensed with; and it is not even necessary to refer in the motion to the standing orders at all. Any order or resolution, inconsistent with their terms, has, if adopted, the effect of suspending them, and the House is, in fact, constantly adopting special orders that change the course of procedure as prescribed by the standing orders or the customary practice.[1]

The rules of American Assemblies generally require that change shall be made by a two-thirds, three-quarters, four-fifths,

[1] A. L. Lowell, *The Government of England*, I, 256.

or even unanimous vote, though sometimes the requirement is for notice of a day or more. What would happen if a mere majority undertook to disregard such requirements may furnish food for ingenious speculation, but as a matter of fact the question, so far as I have observed, has never arisen in practice. It is remarkable proof of the good faith of our deliberative assemblies and the law-abiding characteristics of our people, that nobody ever thinks of thus violating agreements whenever protest is raised. Too much, however, we ignore them for the sake of speed, and in this regard the English habit of mind is the safer. A newly elected Irish Member once asked Mr. Parnell, "How can I learn the rules of the House?" "By breaking them," was the prompt answer. Parliament is said to be more punctilious in the observance of orders and usages than any other legislative assembly in the world. Sometimes it seems to an American to carry scruple to excess. Yet probably in the long run that conduces to better lawmaking.

Fewer rules would be thoughtlessly broken if there were fewer rules to be broken. We have too many. The codes abound in provisions evidently inserted for some temporary purpose or else made obsolete by change in habit. Some of them are perpetuated by inertia. Take for example the seconding of motions. In the dark ages of parliamentary law, somebody conceived that Parliament ought not to be vexed by a proposal not approved by at least two members. So the device of seconding motions was invented. Although it has long outlived its usefulness, it yet survives where it originated. Sir Thomas Erskine May says that "in the Commons every amendment must be proposed and seconded in the same manner as the original motion; and if no seconder can be found, the amendment is not proposed by the speaker but drops, as a matter of course, and no entry of it appears in the Votes."[1] Jefferson found the practice in Parliament and put it in his "Manual." In the National House the requirement became obsolete very early, and as far as it concerned ordinary motions was dropped from the rules when they were revised in 1880. It does not appear in the Senate rules and doubtless has there had the same history. It survives in the rules of at least fifteen State Legislatures. In Indiana it is required by the House rule and may be demanded in the Senate. Speaker Baldwin of the Connecticut House ruled in 1897 that a motion for the

[1] *Law, Privileges, Proceedings, and Usages of Parliament*, 233.

previous question must be seconded. In Iowa, the rule of the lower branch, that "when a motion is made and seconded, it shall be stated by the Speaker," is not enforced in the matter of seconding, except that a second is generally required on motions to reconsider and for the previous question. The Senate has by usage abandoned the practice. The Georgia rules specify that seconding is not necessary. Massachusetts did away with it long ago. It wastes time and is useless.

With the rules of a legislative body as with the by-laws of any sort of an organization, the fewer the better. Provisions not frequently brought into play in ordinary routine are likely to be chiefly effective in bringing the unwary to grief under circumstances not contemplated. They are more likely to be used to hamper than to help the purposes for which the body exists. Sometimes, indeed, rules are made complicated and rigid for this very purpose. From the time when the slavery question came to trouble the peace of the country, the rules of the National House were shaped to make legislation difficult. The South was anxious that there should be at its disposal ample means to stop any measure detrimental to its cherished institution. The inheritance from those days still embarrasses the work of Congress. Many of the Legislatures still work under codes long since outgrown. Yet the task of reforming them to meet modern conditions is not so easy as it looks. The general body of rules is adopted at the opening of a session when a large part of the members are novices, quite ignorant of what changes ought to be made. Most of the veterans prefer the procedure they have mastered. So a proposal for revision then gets short shrift. If toward the end of a session some reformer thinks of using his experience for the benefit of his successors, his associates will say, "After us, the deluge!" Those who do not expect to come back are indifferent. Many of the others are too busy with the problems of the moment. Deliberate, well-considered improvement is thus made difficult, and most of the changes come about through the passing needs of partisan or factional controversy.

The rules of Congress greatly need thorough revision. A time-honored system, doubtless well adapted to the conditions of a century ago, has become archaic. More than any other one thing is it responsible for such inefficiency as may be fairly charged. There would be no exaggeration in saying that were the system to be remodeled along lines already thoroughly tested by other

legislative bodies, without the introduction of a single novelty, the session could be reduced in length one quarter, or a quarter more work could be turned out, as might be preferred, and in either case the product would be better.

The chief defect lies in the payment of too much regard to what are alleged to be the rights of minorities — not the party groups that properly need protection, but individual members. "Unanimous consent" is the chief bane of Congress. One man may demand the presence of a quorum and by selfish use of that power waste many precious hours. The only two days in each month when matters of general public interest other than the appropriation bills can normally get a reasonable chance are "unanimous consent" days, when any unreasonable, obstinate, pigheaded, or angry member can prevent action. To be sure there is "Calendar Wednesday," when committees take their turn, but a session may pass without making the round of the committees more than once. The fact is that outside the appropriation bills and a few big measures given the right of way by the Committee on Rules, congressional lawmaking has become largely a matter of unanimous consent. Yet nobody can show why progress ought to be at the mercy of one man out of 435. It is once more the "liberum veto" which ruined Poland of old. The remedy is of the simplest — require objection by two, three, five, ten, twenty members.

Equally simple remedies for other wastes of time are at hand. Calendars that are really calendars, orders of business, agenda, should in advance disclose each day's work and should be strictly followed, each matter taking its turn. Stop the reading of bills by the Reading Clerks, relying instead on printed copies. Remove general debate (as far as that means talk not relative to a pending bill) to a definite, limited part of each session or a certain session in each week. Take record votes by the use of electric apparatus. By practice rather than by rule suppress ineffectual debate, through the drastic application of the previous question by a floor leader or upon intimation from the Speaker. In nearly every debate the time comes when it is apparent that the House has made up its mind and nothing more that may be said will change the result. This is the moment for the skillful leader to interpose and to compel action.

Also by practice such a leader should be encouraged to control the allowance of time with fair regard to the relative importance

of measures. Congress, like every other legislative body, lacks the sense of proportion. It is a sense not found in group action. Only from individual leadership can we hope for judicious apportionment of the available time. As things go now, hours are sometimes spent over outlays of a few hundreds of dollars, and minutes given to millions.

To such changes of rules and practices should be added changes by statute that would transfer all private claims to a judicial commission, if the powers of the Court of Claims cannot be safely expanded. To safeguard the treasury, the findings of such a commission should be tentative, subject to reversal by Congress upon affirmative action within a specified number of months, but in lack of such action, then to become final. Using the same principle, so advantageously developed in England, the initiative in the affairs of the District of Columbia should be taken almost wholly out of Congress. Whatever the administering body for the District, its ordinances and appropriations should be subject only to a temporary possibility of review. The same principle ought to be extended to much of the administrative detail of the Departments now drawing away the attention of Congress from the broad questions of policy that ought to engross its capacities and that by themselves would amply occupy its time.

Observe that these proposals imply no criticism whatever of the faithfulness or public spirit of the members of Congress. No dereliction of duty is implied. No fault is found with purpose or policy. Here is nothing but matter of technique, propounded solely with mechanical efficiency in mind.

Do not suppose that ours is the only great national assembly needing a drastic dose of common sense. Lord George Hamilton, writing his "Parliamentary Reminiscences" in 1916, after many years of experience in public life, declared (p. 213): "In my judgment the reform of the rules and procedure of the House of Commons is by far the most pressing and urgent political question of the day. Men of ability, understanding, and character will not become candidates for a legislature where they know that, under existing conditions, they will have little to do but loaf and vote. A well-known member of Parliament who has made himself an authority on personal questions of this kind told me the result of his experience upon this point. He said that he had not met a single member of Parliament who, having

achieved success outside politics, and being in consequence induced to enter the House of Commons, did not soon regret the political venture he had made. When asked for the reason, he replied: 'The procedure and intolerable waste of time under it.'"

Note one instance of the possibilities in the House of Commons, as averred by Hamilton (p. 210): "On money bills, independent of the unlimited power of speaking in Committee, every member has the power of making, if he chooses, on seven different occasions, the same speech over and over again. On ordinary bills a lesser but similar verbosity can be exercised. The brazen-faced advertiser, of whom there is always a number in each Parliament, soon finds out that the House of Commons is the best advertising-board in the world." Whatever our sins of license, at any rate nothing like this is permissible in Congress, nor so far as I know in any of our Legislatures. So we may get what consolation we can from the knowledge that our assemblies are not the most time-wasting in the world. Yet that they are woefully prodigal of precious hours is beyond dispute.

A great member of Parliament once said: "The time of the House of Commons is the treasure of the people." So it is with Congress and every Legislature. To protect and preserve that treasure is no trivial concern, but well worth serious study and earnest effort.

CHAPTER II

THE QUORUM

When justices of the peace were appointed in each county of England, the commission specified some of those named, or one of them, without whose presence no business could be done. The direction for this, in Latin, began with the word "quorum" — "of whom" — and the word came to be used to express in brief the idea of a certain necessary attendance. Very little is known as to how or when this idea was formulated. We find the Commons petitioning in 1397 that because certain peers and bishops were absent, Parliament should be adjourned whilst they were sent for, but this was probably no more than recognition of the propriety of having on hand all the parties to a bargain. Many centuries earlier the dangers of a small attendance in a lawmaking assembly were familiar. Æschines says that Demosthenes contrived to have a most important preparatory ordinance of the Athenian Senate brought before the ecclesia when it had already risen, and when Æschines and most others had left the meeting. Episodes of the same sort could hardly have been unknown in Parliament, but evidently for a long time they were not important enough to call for weighty action. Perhaps the first trace of recognizing the need is the record that on the 20th of April, 1607, no bill was read and the House rose at ten o'clock, "being not above threescore." [1] Formal action on the subject first appears January 5, 1640, when it was declared, "as a constant rule, that Mr. Speaker is not to go to his Chair, till there be at least forty in the House." [2] It is supposed that this was a precaution taken by the Puritan majority in this the Long Parliament, lest they be caught by surprise through a slim attendance in the early hours of the sitting.

Why the number forty was chosen is wholly matter of conjecture. A somewhat fanciful suggestion is that inasmuch as there were forty English counties, it may have been intended that there should always be present one from each county. More probably the number was chosen arbitrarily with the idea that it would be large enough to secure a fair attendance and yet not

[1] *Hatsell's Precedents*, II, 127.

be irksome. Inasmuch as there were 506 members in the Long Parliament, the figure selected was certainly generous to the tardy and the truants. The choice of so small a number quickly proved fortunate. In December of 1648 so many of the members were in prison that sometimes the Speaker was obliged to send the guards to bring in enough prisoners for making up the twoscore. The number has never been changed. Forty members of Parliament still can do business, either as a House or as a Committee of the Whole.

The House of Lords is yet more liberal. There a quorum is fixed at only three. It was a principle of Roman law that three persons were enough to make a "collegium" — equivalent to our word "corporation" — and hence undoubtedly the quorum of three for the Lords. If, however, upon a division it is found that less than thirty members are present, the question is declared not to be decided.

It is singular that provision for a quorum was made in a colonial charter before Parliament itself had a rule on the matter. The Massachusetts Bay charter (1629) provided that there should be eighteen Assistants; "and that there shall or maie be held and kept by the Governor, or Deputie Governor of the said Company, and seaven or more of the said Assistants for the tyme being, — one greate generall and solemne assemblie," etc. The probability is that mercantile corporations were already accustomed to a provision of this sort, and as our colonies were at the outset nothing but trading companies, the stipulation was not novel. This cannot be said of the order of March 8, 1630–31, whereby it was directed that whenever the number of Assistants resident within the jurisdiction might be fewer than nine, it should be lawful "for the major parte of them to keep a Court." However, the order probably referred to a trial court. It appears to have aroused no question of conflict with the charter. Upon the reorganization of government by the charter of 1691, a quorum for the lower branch was provided by statute, in October, 1692: "Forty representatives at any time so assemblied shall be accounted a number sufficient to constitute a House, pass bills, and to transact and do any business proper to be done in that House." Here was an evident copying of the rule of the Long Parliament. It is quite improbable that there was any independent consideration of the matter.

The Rhode Island charter made no mention of a quorum for

the lower branch and trouble seems to have resulted. The records warrant the surmise that the authorities took advantage of a small attendance to push through something obnoxious to the people. In November, 1672, the Deputies, as "representatives of the freemen of the colony," demanded the prerogatives accorded to the House of Commons in England, and in the reform bill that followed, on a level with the all-important right of consenting to taxes, they put the requirement that "in all weighty matters, wherein the King's honor is most concerned, and the people's rights and libertys most jeoparded . . . the Assembly shall be the major part of the Deputys belonging to the whole Collony, as there must be the major part of the Assistants (by the charter). Butt otherwise, such said act (if made without the greater part of the Deputys present) such said act shall be voyd and of none effect." [1]

In Virginia the quorum varied. In 1685 twenty-three Burgesses met and said that since they were neither a House nor had a Speaker, they could not even adjourn, but must wait for the Governor to prorogue them. In October of 1748, the House decided by a vote of 44 to 35 that forty-one should be a House to do business. A few years later (1756) twenty-five were declared enough, but in 1769 the standing order was that the Speaker and fifteen members should be enough to adjourn, thirty to call the House and send for absent members, and fifty to proceed to business.[2]

In the first few years of the Maryland Assembly its quorum was fixed at ten members, but this was soon changed to a majority. The Concession and Agreement of the Lords Proprietors of the Province of New Cæsarea, or New Jersey (1664), allowed the Assembly "to ascertain the number of their quorum," provided it be not less than one-third part of the whole. The Fundamental Constitutions of East New Jersey (1683) made one half a quorum. This was the policy after the proprietors of the two colonies surrendered their rights to the Crown, until the conflicts of the Assembly with Hunter and Burnet led the people to think a larger quorum would be safer, whereupon they made it two thirds. In 1746, the attendance of sixteen being necessary, and only fifteen being at hand, adjournment was taken to the house of a sick member, where it was resolved that fifteen should

[1] *R.I. Col. Rec.*, II. 472–73.
[2] E. I. Miller, *The Legislature of the Province of Virginia*, 105, 110.

be the quorum. In 1772, the size of the Assembly having been increased, the quorum was changed to twenty with a requirement for twenty-four when money was to be raised.

William Penn's Charter of Liberties to Pennsylvania in 1682 provided: "In the provincial Council in all Cases and matters of moment as There agreeing upon Bills to be passed into Laws Exorting Courts of Justice having Judgment upon criminals Impeached and choice of Officers in such manner as is herein after menconed Not lesse than two Thirds of the whole Provincial Council shall make a Quorum and that the Consent and approbaton of Two Thirds of said Quorum shall be had in all such Cases and matters of Moment. And moreover that in all cases and matters of lesser moment Twenty-ffour members of the said Provincial Council shall make a quorum The Majority of which ffour and Twenty shall and may always determine on such Cases and Causes of Lesser moment." (The whole number of the Council was to be seventy-two.) This ingenious and ingenuous rule was embodied in the Frame of Government of 1682, and in substance was repeated in 1683 and again in 1696, disappearing with the abolition of the Council as a part of the Legislature in 1701. The quorum for the General Assembly was two thirds, with no discriminations for minor business. So large a requirement was fatal to that body when in the Revolutionary period the movement for a Constitution became irresistible. The enemies of change tried to keep the old Assembly a-going, but less than two thirds of the members attending day after day, the situation became ridiculous at last and the old system had to make way for the new. Nevertheless the two-thirds quorum was put into the State Constitution.

By the Carolina Concessions of 1665, a quorum was fixed at a third part. Locke in his Fundamental Constitutions of 1669 made thirteen a quorum of the Grand Council, which was to have fifty members; for the Parliament one half was to be the quorum. Governor Glen of South Carolina, in a letter to the Duke of Bedford in October of 1748, expressed the belief that the greatest evil in the legislative processes of the province was in regard to a quorum of the House. Its membership was forty-five and the requirement of nineteen for a quorum caused many delays. He had frequently seen seventeen or eighteen attending and adjourning day after day for a week together, until at last it was thought proper to prorogue them for a month or two, and

then by reason of the same inconveniences it had been necessary to dissolve them. Sometimes he had seen a pleasure party made up to go out of town purposely to break the House and thus prevent the success of what they could not otherwise oppose.[1]

In North Carolina the instructions of the Crown to Governor Dobbs were that fifteen should be a quorum of the lower House, but the House claimed the right to determine what attendance should be necessary. At times it would let twenty-five act, and again it would not make a move toward transacting business without a majority of its entire number. The quarrel with the Governor on this score was of importance, because it was much harder for him to control from twenty-five to thirty-five members than fifteen. It was thought with a small quorum he might easily get the passage of acts against the interests of the colonists that it would be impossible for him to get with a large quorum.[2]

The instructions to Governor William Tryon of New York in 1771 read: "And although by our commission aforesaid, we have thought fit to direct that any three of the members of our said council make a quorum, it is nevertheless our will and pleasure that you do not act with a quorum of less than five members, unless upon extraordinary emergencies when a great number cannot conveniently be had." The Council then had eleven members besides the Lieutenant-Governor.

Judging by the first Constitutions of our original States, the belief that a Legislature ought not to do business without the attendance of more than half its members had by the time of the Revolution become general, though not universal. In the tentative document with which New Hampshire led the way, a majority was specified for a quorum of the new elected Council, and as no reference was made to the quorum of the House, which was the Congress continued under a new name, we may assume it was on the majority basis. Virginia at the start made it a majority for the Senate, but was silent about the House. When Jefferson, in his "Notes on Virginia" (1782), pointed out six "very capital defects" in its Constitution, one of them was "that the Assembly exercises a power of determining the quorum of their own body which may legislate for us." He said that for some time the Assembly had required a majority, but in 1781 had

[1] Edward McCrady, *Hist. of So. Ca.*, II, 260.
[2] C. L. Raper, *North Carolina*, 217, 218.

made forty the quorum, "during the present dangerous invasion, . . . moved to this by the fear of not being able to collect a house." The original proof-sheets of the "Notes" read: "But they might as well have voted that a square inch of linen should be sufficient to make them a shirt, and walk into public view in confidence of being covered by it." Evidently he concluded the figure too strong, for he struck out all after "But" and made it read — "this danger could not authorize them to call that a house which was none; and if they could fix it at one number, they may at another, till it loses its fundamental character of being a representative body." This was not remedied until in 1830 the attendance of a majority was prescribed. Delaware, also silent on this point at the outset, specified a majority in 1792.

Pennsylvania was the only one of the original thirteen to begin with a quorum of two thirds, reducing it to a majority in 1790. Vermont, in 1777, copied Pennsylvania, but changed to a majority in 1786, still requiring, however, the presence of two thirds of the members when raising the State tax. Of the newer States, Tennessee, Ohio, Indiana, Illinois, Arkansas, Texas, and Oregon all started with a requirement of two thirds, but Ohio changed to a majority in 1851, Arkansas in 1868, and Illinois in 1870, leaving but four States now calling for the attendance of two thirds. Wisconsin, however, in 1848 required a quorum of three fifths on the final passage "of any law which imposes, continues, or renews an appropriation of public, or trust money, or releases, discharges, or commutes a claim, or demand of the State." With verbal changes New York copied this in 1874. Indirectly other States require a two-thirds quorum by their stipulations that certain classes of measures shall receive an affirmative vote of two thirds of all members elected, as, for example, the provision in Iowa, Michigan, New York, and Rhode Island that two thirds of the members elected to each House must vote for bills appropriating money to private or local purposes if they are to prevail, and a like provision in Nebraska relating to appropriations to supply deficiencies.

New Jersey, Maryland, North Carolina, and New York started with a majority quorum.

South Carolina, Georgia, and Massachusetts have been the only States permitting less than a majority to do business, and all three have abandoned the practice. At the outset South Carolina, although requiring a majority for the Council, allowed

forty-nine out of 202 members of the lower branch to act, a figure changed to sixty-nine two years later, and then to a majority in 1790. Georgia originally made no specification for the House of Assembly, though requiring a majority for the Council, not then a recognized upper branch. In 1789 it authorized one third of the members of the lower House to proceed, but in 1798 changed to a majority. The Constitution rejected by Massachusetts in 1778 would have made nine a quorum of the twenty-eight Senators, and sixty a quorum of the Representatives, of whom there would have been about 350. This was one of the provisions to which Theophilus Parsons took exception in writing the "Ipswich Result," which had so much influence in defeating the Constitution. He said the House could change its membership six different times. "The number of members, whose concurrence is necessary to enact a law, is so small, that the subjects of the State will have no security that the laws which are to controul their natural rights, have the consent of a majority of the freemen." Nevertheless the Constitution accepted in 1780 made only sixteen a quorum of the Senate, which has always had forty members; and sixty a quorum of the House, which has varied in size, in many years being so large that the greater part of from one fifth to one tenth of the membership could bind the whole if the others chose to be absent. In 1857 the danger was lessened by making a quorum of the House 100, and in 1891 a majority was stipulated for each branch.

New Hampshire, in 1784 imitating Massachusetts in many particulars, departed from her model in this respect, required a majority, and added a provision in which she is still unique. When less than two thirds of the Representatives are present, the assent of two thirds of those present is necessary to render their acts and proceedings valid. While the Senate had but twelve members, if less than eight were present, five had to concur; when in 1902 the membership was doubled, it was required that if less than sixteen are present, ten must concur.

Quorum difficulties contributed something toward creating the nation. By the Articles of Confederation adopted in 1777, each of the thirteen States was to send to Congress not less than two nor more than seven delegates, and the voting was to be by States, each having one vote. On important matters of war and finance duly specified, the assent of nine States was necessary; on other matters, a majority. As each State had to bear the cost

of its delegates, the motive was strong to keep down the representation to the minimum. Seldom were more than one third of the possible maximum of ninety-one in attendance. The requirement of assent from nine States delayed the dispatch of business so that sessions almost continuous were necessary, which of itself made a quorum harder to get. Sometimes one eighth of the members present could prevent action on the most important measures.

In the Federal Convention there was brief debate on the matter. Two of the Massachusetts men, Nathaniel Gorham and Rufus King, reflected the attitude of their State by standing up for a small quorum; "otherwise," as Gorham put it, "great delay might happen in business, and great inconvenience from the future increase of members." Mercer of Maryland also was for less than a majority, and would have left Congress to fix the number. Colonel Mason, on the other side, thought it would be dangerous to the distant parts of the country to allow a small number of the members to make laws. Members from the Central States would always be on the spot; and by meeting earlier than the arrival of those from a distance, or wearying their patience and outstaying them, could carry such measures as they pleased. Gouverneur Morris wanted to specify the numbers, thirty-three for the House and fourteen for the Senate. This would be a majority at the start, but the other delegates foresaw trouble as Congress grew, and voted him down, nine States to two. After this no vote was cast against the majority requirement as it now stands in the Federal Constitution.

The provision as adopted well illustrates both the impossibility of forecasting all the situations that may call for the application of a rule, and the certainty that step by step the rule will be construed and applied until it becomes fairly adequate. The Constitution reads: "A majority of the House shall constitute a quorum to do business." Speaker Clay held this meant one more than half of all possible members. Without detailing the changes of construction, contrast Clay's view with that reached under Speaker Cannon, who held that when "the House is once organized, a quorum consists of a majority of those members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House." Every one of these qualifications was the outcome of some parliamentary struggle.

Although a majority is the general quorum requirement in other countries, it is not universal. For instance, Japan says: "No debate shall be opened and no vote shall be taken in either House of the Imperial Diet, unless not less than one third of the whole number of members thereof is present." The provisional Constitution of Czecho-Slovakia (1918) made the quorum one third for ordinary business.

Breaking a Quorum

One of the arguments urged upon the Federal Convention in favor of less than a majority for a quorum, was that so great a number as a majority would put it in the power of a few, by seceding at a critcial moment, to introduce convulsions, and endanger the government. Mercer of Maryland advanced this and said examples of what he called "secession" had already happened in some of the States. In reply Colonel Mason, while admitting the inconveniences that might come from the secession of a small number, said he had known good produced by an apprehension of it; he had known an emission of paper money prevented thereby in Virginia. Gouverneur Morris thought the secession of a small number ought not to be suffered to break a quorum. "Such events in the States may have been of little consequence. In the national councils they may be fatal. Besides other mischiefs, if a few can break up a quorum, they may seize a moment when a particular part of the continent may be in need of immediate aid, to extort, by threatening a secession, some unjust and selfish measure."

In Number 58 of the "Federalist" it was either Hamilton or Madison (the authorship is uncertain) who referred to "the baneful practice of secessions; a practice which has shown itself even in States where a majority only is required; a practice subversive of all the principles of order and regular government; a practice which leads more directly to public convulsions, and the ruin of popular governments, than any other which has yet been displayed among us."

Fears of "secessions" were not groundless. The breaking of a quorum has turned out to be one of the most powerful and dangerous weapons at the command of angry and stubborn minorities. Mercer was a prophet when he talked about "convulsions," and if they have not really endangered government, they have at times seemed to come near such an extremity. It is at

least no exaggeration to say that they have furnished some of the most dramatic episodes in our political history.

Not always has the responsibility been that of the minority alone. Sometimes the greater cause of trouble has been the arbitrary action of the majority in coercing the minority. Such was the nature of one exciting struggle that Gorham and King may have had in mind when they wanted the Federal Convention not to make the quorum large, for they came from Massachusetts, and there in June of 1774 it had been of the greatest importance to the patriots that enough members of the General Court should act to comply at least with the letter of the quorum requirement. Delegates to a Congress were to be chosen. Should Governor Gage get a hint of what was going on, he would at once prorogue the Court in order to prevent such action. Hosmer, the biographer of Samuel Adams, describes graphically what happened after enough of the members had been secretly instructed. The spring at last was like lightning. On Friday, the 17th of June, 129 members were present. Sam Adams, at the head of the committee on the state of the Province, suddenly caused the door to be locked, and charged the doorkeeper to let no one in or out. The next instant a series of resolves was introduced providing for the appointment of James Bowdoin, Thomas Cushing, Samuel Adams, John Adams, and Robert Treat Paine, to meet the delegates of other colonial Assemblies, on the 1st of September, at Philadelphia, or at any other place that should be decided upon. The House was at once in an uproar, and an earnest effort was made to choke off the measure. But the majority rose in its power; the lieutenants, secretly drilled, were each in his place, and the arch-conspirator, cool and genial, but adroit and forceful as any man who ever ruled a senate, held every string in his hand. Attempts were made by Tory members to leave the hall, when it became plain how things must go. The doorkeeper, beset and browbeaten by heated men, grew uneasy over the responsibility which was placed upon him; whereupon Sam Adams, with a curious inversion of the great Cromwellian precedent, but with a spirit as self-reliant and straightforward as that of the other great Puritan brewer himself, did not turn his Parliament out, but bolted them in. Making sure that the door was still fast, he put the key into his own pocket.

Some debate there must be, and while it went forward a Tory member, pleading sickness, in some way did manage to make his

escape, and hurried at once to Gage with the news. Forthwith the General prepared the shortest possible message of prorogation and his secretary hurried with it to the hall. The door was still locked, with the key in Samuel Adams's pocket, and even Thomas Flucker, Esquire, no inconsiderable personage himself, and now the messenger of the Governor and Commander-in-Chief, demanded admission in vain. The fact that he was without was imparted to the Speaker, who communicated it formally to the House, but the majority ordered the door to be kept fast. By this time rumors of a great legislative *coup d'état* were flying through the town and a crowd began to collect in the approaches to the hall. To these, for want of a better audience, and also to several members of the House who had come late to the session, Flucker read his message. No tactics, meantime, could long stave off the end at which Sam Adams aimed. The Tories succumbed, the doubtful went over in a troop to the Whig side, the delegates were elected with only twelve dissenting votes, and five hundred pounds were voted to pay their expenses. All that was necessary having been fully and satisfactorily performed, Mr. Flucker was admitted, the Assembly with all grace submitted to the mandate of prorogation, and the members scattered.[1]

A "convulsion" of somewhat the same nature was promptly produced by the Federal Convention itself. The Constitution it framed might never have been adopted had not a quorum been compelled in the first State that faced the issue. In the Pennsylvania Legislature, then composed of but one House, George Clymer moved that a State Convention be called to consider the proposed form of government, and with disregard of parliamentary law the Federalists pushed the thing through the first stages by 43 to 19. It took forty-seven to make a quorum, and if the nineteen stayed away the next day, there would be but forty-five on hand. So the nineteen held an indignation meeting and agreed by absence to foil these outrageous proceedings. The affair was discussed in the taverns until after midnight, the nineteen were abused without stint, and soon after breakfast, next morning, two of them were visited by a crowd of men, who broke into their lodgings and dragged them off to the State House, where they were forcibly held down in their seats, growling and

[1] J. K. Hosmer, *Samuel Adams*, 293–97.

muttering curses. This made a quorum, and a State Convention was immediately appointed for the 20th of November.[1]

Although the forcing of a quorum by such methods had thus become familiar to the statesmen of the period, the other phase of the matter, that of breaking a quorum by "secession," does not seem to have been so well known to some of them as it was to the men who talked of it in the Federal Convention. It was novel to John Adams. He wrote to his wife May 10, 1794: "We had in Senate, a few days ago, the greatest curiosity of all. The Senators from Virginia moved, in consequence of an instruction from their constituents, that the execution of the fourth article of the treaty of peace, relative to *bonâ fide* debts, should be suspended until Britain should fulfill the seventh article. When the question was put, fourteen voted against it, two only, the Virginia delegates, for it; and all the rest, but one, ran out of the room to avoid voting at all. And that one excused himself. This is the first instance of the kind." [2]

He who was to become our greatest American, Abraham Lincoln, took part in an affair of the same sort when he was a young man. The session of the Illinois Legislature in 1839 was enlivened by a singular contest between the Whigs and Democrats in relation to the State banks. The suspension of specie payments by the banks had been legalized up to "the adjournment of the next session of the Legislature." They were not now able to resume, and it was held by the Democrats that if the special session adjourned *sine die* the charter of the banks would be forfeited, a purpose the party was eager to accomplish. The Whigs, who were defending the banks, wished to prevent the adjournment of the special session until the regular session should begin, in the course of which they expected to renew the lease of life now held under sufferance by the banks — in which, it may be here said, they were finally successful. But on one occasion, being in the minority, and having exhausted every other means of parliamentary opposition and delay, and seeing the vote they dreaded imminent, they tried to defeat it by leaving the house in a body, and, the doors being locked, a number of them, among whom Mr. Lincoln's tall figure was prominent, jumped from the windows of the church where the Legislature was then holding its sessions. "I think," says Mr. Gillespie, who was one of those

[1] John Fiske, *Critical Period of American History*, 311–12.
[2] *Works of John Adams*, I, 473.

performing this feat of acrobatic politics, "Mr. Lincoln always regretted it, as he deprecated everything that savored of the revolutionary." [1]

Two years later the man who was to become President upon the death of Mr. Lincoln, Andrew Johnson, helped prevent the attendance of a quorum in the Tennessee Legislature, and thereby shared in keeping vacant for two years one of the seats of that State in the United States Senate. There were three more Whigs than Democrats in the Tennessee House, and the Senate stood 12 to 12 with the odd man elected as a non-partisan, but having Democratic leanings. On the day for a joint convention in the House chamber to elect a United States Senator, the twelve Democratic Senators, Andrew Johnson among them, refused to attend. In Tennessee it takes two thirds to make a quorum. Somebody in the convention called attention to the fact that two thirds of the Senators were not on hand. Nevertheless those present started to organize, whereupon about twenty of the House Democrats left the chamber. This was repeated for four days and then the attempt was abandoned.

Quorum-breaking seems to be a favorite pastime in Tennessee. A secession from its Legislature in 1911 has not in our time been surpassed for novelty or persistence. On the 13th of April in that year thirty-four members of the House, enough to break the quorum, fled to the adjacent State of Alabama, because of their opposition to certain contemplated changes in temperance and election laws. From there they announced their intention of going to Georgia, and then proceeding to enjoy the pleasures of the Atlantic seaboard. In May some of them seem to have straggled back, and perhaps they all presently came where they might be reached by the processes of law at the command of the minority who gathered vainly in the House chamber from day to day, but it may be suspected that the absentees were tacitly left alone in order that tortuous and tedious negotiations for compromise might succeed. On the 24th of June a quorum at last appeared and the phenomenal filibuster was brought to an end.

Nine years later the same State saw a quorum broken under circumstances of a far more serious nature. The stake was the ratification of the woman suffrage amendment to the Federal Constitution. Perhaps ratification by enough States could be so

[1] Nicolay and Hay, "Abraham Lincoln: A History," *Century Magazine*, January, 1887.

delayed that the women could not take part in the Presidential campaign of 1920. Opponents dreamed that ratification might be indefinitely postponed. For Tennessee the result hung upon the vote of the House, almost a tie. When the friends of the amendment prevailed, under the rules the vote was open to reconsideration. As the State Constitution prescribes a two-thirds quorum, when twenty-five "antis" hurried across the Alabama line to Decatur, and fifteen other members stayed away from the capital, the attendance of sixty-six necessary to make a quorum could not be secured. Thereupon the suffragists forced to a vote the motion to reconsider, declared it defeated, and ordered the resolution to be transmitted to the Senate as having passed the House. Ten days after the quorum had vanished, it reappeared, and in the absence of some of the friends of the amendment, a decisive majority voted to expunge from the Journal all record of the proceedings purporting to have accomplished ratification, then to reconsider the original vote of ratification, and finally to non-concur with the Senate. Meanwhile the Governor had informed the Secretary of State at Washington that Tennessee had ratified. Steps were taken to carry the matter, with other issues, to the Supreme Court of the United States, but the contention that the ratifying resolutions of Tennessee and West Virginia were inoperative because adopted in violation of the rules of legislative procedure prevailing therein, was swept aside. The Court held [1] that as the Legislatures of the States in question had power to adopt the resolutions of ratification, official notice to the Secretary of State, duly authenticated, that they had done so was conclusive on him, and, being certified by his proclamation, was conclusive on the courts. This, however, does not remove the occasion for regret that rules were violated. Much depends on the integrity of the rules of legislative bodies, and still more on the observance of Constitutions. The Tennessee House clearly violated the Constitution of the State and disregarded the agreement of the members with each other, made when its rules were adopted. It may be doubted whether any exigency of a partisan nature, however important it may seem to the majority of the moment, can justify the harm done by such violation of good faith and the fundamental law. Such a course sows the seeds of disaster.

[1] Leser *et al. v.* Garnett *et al.*, February 27, 1922.

Speaker Reed's Count

The most celebrated, serious, and sensational of all quorum controversies thus far centered about Thomas B. Reed of Maine, Speaker of the National House. It rose over the question of whether a presiding officer may ascertain the presence of a quorum with his eyes, or must rely wholly on the ears of the Clerk calling the roll. In the early days of the House, when its membership was small, a count by the Speaker was frequent. No question was raised over the accuracy of the principle as laid down, for instance, by Lord Mansfield in 1760, that "whenever electors are present and do not vote, they virtually acquiesce in the election made by those who do." The Constitution, however, said a majority "shall constitute a quorum to do business." If a member present refused to take part in business, was he of the quorum?

The overwhelming majorities of the Republicans during the Civil War period took away much of the occasion for resort to the practice of refraining to vote, but when parties came to be more nearly equal in the House, it was revived and developed alarmingly. A notable case of its use was that in the course of the Force Bill debate of 1875. General Butler, trying to push the bill through before the end of the session, found himself completely balked by the refusal of Democratic members to vote. He tried even to have Samuel J. Randall of Pennsylvania, who was taking part in the proceedings, brought before the bar and compelled to show cause for disobedience of the rules and contempt of the authority of the House. John Coburn of Indiana having made the point more formally, Speaker Blaine said he had never heard of that being done before. He begged to remind the House, that while it was doubtless true there was a quorum in the Hall, the very principle enunciated by the gentleman from Indiana had been the foundation for probably the greatest legislative frauds ever committed. "Where a quorum, in the judgment of the Chair, has been declared to be present in the House against the result of a roll-call," he said, "these proceedings in the different Legislatures have brought scandal on their names. There can be no record like the call of the Yeas and Nays; and from that there can be no appeal. The moment you clothe your Speaker with power to go behind your roll-call and assume that there is a quorum in the Hall, why, gentlemen, you stand on the very brink of a volcano."

When so crafty and resourceful a man as General Butler could not secure effect for the will of the majority, and so aggressive a partisan as James G. Blaine thought the case hopeless, the situation was serious indeed. It grew worse. In 1880 when the Democrats had a majority of the House and the boot was on the other leg, Randolph Tucker of Virginia, a Democrat and an able constitutional lawyer, moved this amendment to the rules: "Whenever a quorum fails to vote on any question and objection is made for that cause, there shall be a call of the House, and the Yeas and Nays on the pending question shall at the same time be ordered, the Clerk shall call the roll, and each member, as he answers to his name, or is brought before the House upon the proceedings of the call of the House, shall vote on the pending question. If those voting on the question, and those who are present and decline to vote, shall together make a majority of the House, the Speaker shall declare that a quorum is constituted; and the pending question shall be decided as the majority of those voting shall appear." The debate showed that not only were the Republicans earnestly opposed to such a rule (among those speaking against it being Garfield, Conger, Hawley, Robeson, and Reed himself), but also the Democrats were far from unanimous. So the next day Mr. Tucker withdrew his motion. Years afterward the application of the new rules gave his son a seat in the House that was contested, and Mr. Reed sent by the son a message, "Tell your father the idea he urged on the House a dozen years ago has saved his boy to-day."

Reed's speech in 1880 presented the traditional arguments in favor of the practice. "It is not the visible presence of members," he said, "but their judgment and their votes that the Constitution calls for." The privilege not to vote "is a privilege which every minority has availed itself of since the foundation of the government." The minority could on great occasions demand that every bill should "receive the absolute vote of a majority of the members elected." They would make this demand "in the face and eyes of the country." If the demand was made on a frivolous occasion it would be subject to public censure. "It is a valuable privilege for the country that the minority shall have the right by this extraordinary mode of proceeding to call the attention of the country to measures which a party in a moment of madness and of party feeling is endeavoring to force."

When he himself became the presiding officer, he exercised the privilege of great men and changed his mind. Once he said in Congress: "I do not promise the members of this House whenever they listen to me to give them wisdom of adamant. I do not promise them I shall not change my opinion when I see good reason for doing it. I only promise that I will give them honestly what my opinion is at the time. They must take the chance of its being for eternity." Again, while Speaker, he was confronted with a passage in his little book, "Reed's Rules," contradicting a ruling he had just made. "Oh," replied Reed coolly, "the book is wrong." In this matter of the quorum there is now no doubt whatever that practical considerations warranted his reversal of position. Obstructionist tactics threatened to prevent all important legislation. The business of the nation must go on, and that which blocks it must be removed.

When on the 29th of January, 1890, Reed ordered the quorum to be counted, great was the excitement. Nothing like it had been seen since the critical times before the War. But the next day, when he repeated the process to get the quorum necessary for the approval of the Journal, the uproar was greater yet. The vocabulary of invective was exhausted for epithets to meet the occasion. Czar, Tyrant, Despot — were among the milder insults hurled at the Speaker. In the din of hoots, jeers, hisses, no argument could be heard. Occasionally some stentorian voice would make a brief sentence rise above the tumult. "I deny the right of the Speaker to count me present," shouted McCreary of Kentucky. And Reed drawled in reply, "The Chair simply stated the fact that the gentleman from Kentucky appears to be present; does he deny it?" Another Kentuckian, Breckenridge, condensed his protest into — an "arbitrary, corrupt, and revolutionary action."

At last realizing that if they were in sight, they would be counted, the Democrats tried to get out of sight. Some dodged under their desks or behind screens; others rushed for the door. Kilgore of Texas found a door bolted, kicked it open, and fled. In the wild scramble dignity was thrown to the winds; physical injury was not escaped. Nothing of the sort ever before so disgraced an American Congress.

Ludicrous as the whole episode seems to us now, it was bitter earnest for the baffled minority of the moment. Yet even then the sense of the ridiculous was not wholly wanting. General

Spinola pointed to the painting of the Siege of Yorktown hanging in the hall, and gravely charged the Speaker with counting the Hessians in the background in order to complete his quorum.

Reed said in his ruling February 17, 1890: "By what method shall the presence of a quorum be ascertained? I think an examination of all the books of parliamentary practice will show that it has been the custom from time immemorial for the presiding officer to determine, in such manner as he deems accurate and suitable, the presence of a quorum. The rules of this House contain nothing derogatory, not to that power, for it is not a power in his hands; it is merely the performance of his duty. He can do it by a count which satisfies him, or, if it is seriously questioned, as it has been in this case, the fact can be ascertained in other methods."

Cushing, the foremost of American authorities on parliamentary law, had said: "When the question is put, all those members, and those only who are properly in the house, are allowed and may be compelled to vote." In Parliament it had been the custom for the Speaker to determine by count whether a quorum was present. American presiding officers had frequently followed that precedent. Speaker John E. Sanford in the Massachusetts House of 1874 ruled that "it is not necessary to a valid decision of a question that a quorum shall vote if the required number be present." President Albert E. Pillsbury of the Massachusetts Senate ruled in 1885: "It is immaterial that a quorum does not vote if a quorum is present." David B. Hill, presiding in the New York Senate in 1883, took the same position, and it had been the view of another Democrat, Speaker of the Tennessee House in 1885.

The courts had been of like opinion. In Maine, in 1880, they held to be valid the acts of a Board of Aldermen when a silent minority tried to block action. In Illinois the court said: "There is no propriety in giving to a refusal more potency than to a vote cast." The New Hampshire Supreme Court declared: "The exercise of the lawmaking power is not to be stopped by the mere silence and inaction of some of the lawmakers who were present." In 1889 the Supreme Court of Indiana spoke even more emphatically: "It is inconceivable that their silence should be allotted greater force than their active opposition. . . . Certainly the most that can, with the faintest tinge of plausibility, be claimed is

that their votes must be counted against the resolution. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition."

It was argued that the Constitution does not say a majority *voting* shall constitute a quorum, but a majority *of the House* shall constitute a quorum to do business. The provision for allowing the attendance of absent members to be compelled would be nugatory if those actually present could not be counted. If more than attendance were needed, the Constitution would have so provided. Congressman Butterworth asked: "Was this authority conferred by the Constitution only to enable us to go through the farce of bringing in the absentees and learning after each member has been seated in his place that, while under the Constitution he is actually personally present to make a quorum to do business, yet when an attempt is made to do the thing which required his presence, he at once by merely closing his mouth becomes constructively absent?" The constitutional provision for compelling attendance is valueless unless, when that attendance has been secured, it can be made effective. The House could not constitutionally delegate to its Speaker the power to punish for disorderly behavior. The remedy of punishment by the whole House would be ineffectual. The sole purpose of the Yea-and-Nay provision is to inform constituents how members voted. The idea that it shifts the constitutional quorum from a majority present to a majority acting is illogical and unsound. If every member responded to his name on a call of the Yeas and Nays, it would, to be sure, be the most accurate way of ascertaining the presence of a quorum; whenever any fail to answer, this fails as a test and loses its claim to use for that purpose. Were a stranger present and responding to a call of the roll, the President or Clerk would reject his vote; therefore, the vote is not conclusive, by itself.

On the other hand it was represented that there are great and solemn occasions when the minority should have the right to demand a majority vote of all those elected to membership. The spirit of our institutions is that affirmative action should be by a majority of the whole, not by a majority of a minority. John G. Carlisle argued: "The tendency in recent times is to require, by express constitutional provisions, the affirmative vote of a majority of all the members elected to legislative assemblies in order

to pass bills, and to make it imperative in every case that the Yeas and Nays shall be taken and entered upon the Journal. In some of the States this provision applies only to bills appropriating money, or creating public liabilities, or imposing taxes, while in others it applies to all matters of legislation; but to whatever extent it goes, it indicates clearly a growing disposition among the people to be more careful in the delegation of power to their representatives and to require a vote of actual majorities to enact laws." [1]

If the Constitution does not mean that the Yeas and Nays shall represent a "quorum," then it does not guarantee, as was designed, an absolutely correct record of the vote. If the Clerk can be trusted to count and record a certain proportion of the names, he should be trusted to count and record all the names. It was never designed that there should be two ways of counting a quorum on a Yea-and-Nay note. He who abstains from voting feels that thereby he can best represent his constitutents, and the right so to do should be sacred. Should his course prove to be an obstacle in the path of the majority, it would be no more blameworthy than the Constitutions themselves — all obstacles in the path of the majority. The multitude clothed with unlimited power is as dangerous as any despot.

The question reached the Supreme Court upon the contention that because of the quorum-counting rule the tariff act of 1890 had not been legally passed. Justice Brewer, delivering the opinion, in U.S. *v.* Ballin, 144 U.S. 1 (1891), sustained the rule. The constitutional provision was interpreted as meaning that when a majority are present, the House is in a position to do business. "Its capacity to transact business is, when established, created by the mere presence of a majority. The Constitution has prescribed no method of determining the presence of a majority, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers and their count as the sole test, or the count of the Speaker or the Clerk, and an announcement from the desk of the names of those present." Apparently clear record of the presence of the non-voters is essential. In Webb *v.* Carter, 129 Tenn. 182 (1913), when on the question of passing a bill over a veto the Journal

[1] *North American Review*, March, 1890.

showed 52 voting Aye, 4 No, and 2 answering "present but not voting," — and in the case of thirty-five others the Speaker answered "Not voting" as the names were called, — the court held there was no presumption that sixty-six, the required two thirds, were present.

The principle laid down by Speaker Reed in January of 1890 was embodied a fortnight or so later in a rule adopted as part of the revision made at that time. At the next election, the Democratic Party carried the House of Representatives by a very large majority and proceeded to restore the ancient method of ascertaining the presence of a quorum. It continued this method in force in the succeeding House, which it also controlled. However, Mr. Reed, who was then the minority leader, made a determined attack upon the position of his adversaries. He found so many members of the majority party were absent in making their canvasses for reëlection and upon other business, that, notwithstanding their majority was nearly one hundred in the whole House, a sufficient number of them were not present to make a quorum. He resorted to the expedient of demanding the Yeas and Nays each day upon the approval of the Journal.

The roll would be called, and the members of his party under his lead would refrain from voting, although present, and the vote as announced would show that a majority of all members were not present. Under the rule a call of the House would then be taken to ascertain whether a quorum were present. The members of Mr. Reed's party would answer to their names upon this call, and it would be found that a quorum was present. That fact having been determined, the question would again recur upon approving the Journal, and the Republican members would again refrain from voting, and a majority of the whole House not answering, a call of the House would again be in order. This proceeding continued for weeks, and the majority party was unable to approve the Journal or to transact any other business. Finally it was compelled to bring in a rule providing for the counting of members who were present, but did not vote, in order to make up a quorum. It is true that the device of having the count made by tellers rather than by the Speaker was adopted, but the principle of a present, instead of a voting, quorum was accepted by Mr. Reed's political adversaries, and thus the principle which as Speaker he had established, by what appeared to be revolution-

ary ruling, was recognized and has ever since remained a part of the law of the House.[1]

The 54th and 55th Congresses restored the form used in the 51st. The rule now says that on the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote shall be noted by the Clerk and recorded in the Journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business. Democratic Speakers frankly recognize that the House frowns on filibustering, and take occasion so to remind it, shaping their rulings to conform thereto. The quorum-counting rule has met with general acceptance and there is rarely occasion for its use.

In the Senate the right to count a quorum seems to have been acted upon earlier and to have become established later than in the House. In 1858 (March 15) Vice-President Breckenridge stated that the number of Senators voting did not constitute a quorum of the Senate, but that, in the opinion of the Chair, a quorum was present in the chamber. In 1871 (February 23) Senator Matt H. Carpenter, presiding, said that if before the result of a call of the Yeas and Nays had been announced, it appeared that less than a quorum had responded to their names, but that more than a quorum was present in the Senate, as the Chair could determine by counting the Senators, "it must be presumed that such Senators had omitted to vote through inadvertence, and the Chair, without motion, or upon the suggestion of any Senator, would direct the Secretary to call the names of Senators present and not voting; but if such Senators still refused to vote, the result of the roll-call must be announced to the Senate, and it was then for the Senate to determine whether and how it would deal with such offending Senators."

In 1879 (June 19) Senator Thurman, presiding, counted the Senate and thus announced a quorum present: "The Chair has usually taken the fact of there being no quorum voting as evidence that there was no quorum present; but the Chair has not decided that it is not possible to ascertain otherwise whether there is a quorum. The Chair does not think the fact that a quorum has not voted is conclusive evidence that a quorum is not present. On the contrary, in the opinion of the Chair,

[1] Samuel W. McCall, *The Business of Congress*, 82.

he has a right to count the Senate. He has counted the Senate and found that a quorum is in attendance; but a quorum has not voted." In 1881 (March 3), no quorum voting on a motion to postpone, Senator Cockrell, presiding, proceeded to count the Senate, and announced the presence of a quorum.

On the other hand, when, in 1897 (March 3), Senator Hoar maintained that the last vote having shown a quorum, the Chair, if on inspection he saw there had been no substantial change in the condition and composition of the Senate, should refuse to entertain a suggestion that no quorum was present, Senator Bacon, presiding, overruled the point, saying he knew no way in which such an inspection could be made save by counting, and that he knew of no rule in the Senate which justified or authorized the presiding officer to count a quorum. However, in 1908 (May 29), Vice-President Fairbanks counted a quorum present and declared that a motion had prevailed, though a quorum had not voted on it. Again, in 1912 (March 20), Vice-President Sherman held that when a roll-call had ascertained the presence of a quorum, the following vote stood, although not shared in by a quorum.

Another question has been presented by Senators not voting because they were paired. Should they be counted to make a quorum? In 1910 (December 17), Vice-President Sherman counted a quorum by including members present and paired. Two days later, issue was taken with this ruling, but Senator Gallinger, presiding, held the point of order too late, as the Journal announcing the fact had been read and approved. On that same day, however, the Senate reversed the ruling, by a vote of 17 to 37, when Vice-President Sherman pursued the same course by adding to a vote the names of Senators present who had announced pairs. He persisted in his view, and in 1911 (August 11) counted toward a quorum six Senators who had announced pairs. The next day Senator Bacon protested against the decision, but on the 20th of the following March Mr. Sherman took the same position again. Then, on the 25th of May, Senator Lodge, presiding, said it had not been the practice of the Senate to count as present in order to make a quorum those Senators who announce pairs and refrain from voting. Nevertheless, on the 4th of June, Mr. Sherman once more counted paired Senators.

Mr. Sherman's position agreed with that taken by the Supreme Court of Virginia in Wise *v.* Bigger, 79 Va. 269 (1884).

The plaintiff had questioned the validity of an apportionment act, in part on the ground that it did not get in the Senate the vote necessary to pass it over the Governor's veto. Although there were not less than twenty-nine of the forty-three Senators in the chamber, only nineteen voted for the bill. The plaintiff alleged it was not within the lawful power of the Senate to convert a majority into a two-thirds vote by recognizing pairs, but the court took the opposite view.

While the controversy raised by Speaker Reed's ruling was still a live issue, Theodore Stanton interrogated the officials of Continental Parliaments and found that their procedure on the whole favored Mr. Reed's position. In France, where parliamentary institutions have had the most development, the procedure directly supported him. Not only did several authorities agree that the presiding officers had the right to count all members present, whether voting or not, but also specific instances of the practice were cited. In Norway obstruction would be impossible because the rules provided a fine that might run from about $110 to about $1100 for a member absenting himself. Sweden had no quorum requirement, and no way to force a member to vote. When in Belgium a member did not vote, the rules called upon the President, after the roll-call, to invite him to give his reasons for not voting. In Denmark the President counted non-voters on the floor as present, and the President of the Reichstag in Germany would be inclined to do the same thing should occasion arise.[1]

Is Modification Desirable?

Inasmuch as our American experience has brought us so generally to agree on a majority for a quorum, and that requirement has been so thoroughly embodied in our Constitutions, discussion of the principles involved might at first blush seem academic and suggestion of change might seem idle. Nevertheless the situation works such mischief that it ought to be confronted. To appreciate its harm, consider the bearings of the fact that in the 66th Congress (1919–21) as a result of the use of the quorum requirements there were 249 calls of the House of Representatives sitting as a House or as a Committee of the Whole, and 182 roll-calls compelled by calling the attention of the Chair to the absence of a quorum as disclosed by a rising vote or by his count.

[1] *No. Am. Review*, December, 1891.

Inasmuch as a call requires nearly half an hour, these 431 calls meant about 200 hours of the time of the House, and as that body averages to sit five and a half hours a day, they took six weeks of working time. Surely that statement alone ought to show the vitality of the problem.

In examining it, start by observing that the requirement of a majority for a quorum is wholly arbitrary, with no ethical element whatever. Nobody will be justified in contending that a majority of a majority, that is, a little more than one quarter of the whole number, may of right bind the others. If a basis of principle is to be sought in this direction, it cannot be found short of the requirement that every vote shall be carried by a majority of the entire membership, which would be the result if the entire membership were to constitute the quorum. This is the practical effect wherever our State Constitutions call for the absolute majority — a not infrequent demand. See what follows. If a quorum chances to be secured by the attendance of just one more than half the members, then any single member can veto every bill presented while that situation lasts, for without his vote no bill can get the absolute majority. Of course this rarely happens, but it is frequently the case that some or many members are absent, often for legitimate reasons, and just in proportion to their absence is the power of the minority increased. To be absent has the practical effect of voting against every bill considered in the course of the absence. So we are told, for example, that in Pennsylvania, where the absolute majority is required for the final passage of a bill, members who really oppose bills, but who for some reason desire not to be recorded against them, refrain from voting. "The uninitiated may think this a neutral position, but the bill would not have been more injured had such a member voted directly against it. A bill will frequently have a far greater number of affirmative than negative votes, but still fail to reach the magic number of one hundred and four." [1]

Judge Story has pointed out that to require more than a majority for a quorum is in effect to give the rule to the minority, instead of the majority; and thus to subvert the fundamental principle of representative government. "If such a course were generally allowed, it might be extremely prejudicial to the public interests in cases, which required new laws to be passed, or old ones modified, to preserve the general, in contradistinction to the

[1] Samuel Bryan Scott, *State Government in Pennsylvania*, 27.

local, or special interests. If it were even confined to particular cases, the privilege might enable an interested minority to screen themselves from equitable sacrifices to the general weal; or, in particular cases, to extort undue indulgences." [1]

If, then, such shadow of principle as may be involved must be abandoned because requirement of full attendance is absolutely impracticable and anything between that and the attendance of one more than half gives undue power to minorities, then where to draw the line becomes wholly a matter of expediency. Turning to practice for light on this, we find that ordinarily divisions result in about the same proportions whether attendance is large or small. This is so well recognized that in every legislative body large numbers of measures are permitted to take readings when a quorum is conspicuously absent. Nobody raising the question, the opposite of the fact is assumed, and very rarely indeed with any damage to the public welfare. Questions seriously contested are certain to secure attendance. The only danger lies in surprise. Usually in the State Legislatures safeguard enough against this is furnished by the requirements for readings on different days — in some States helped by the system of taking up measures in the order in which they appear on printed calendars. Congress lacks such safeguards, but they could be easily provided, as they ought to be anyhow.

As a matter of fact it is distinctly advantageous to do most of the work with a small attendance. It might almost be said that the smaller the better, but of course there ought to be on hand enough members to insure reasonable diversity of views and adequate discussion. Congress does its best work when there are from fifty to eighty men on the floor. The absence of confusion lets them hear each other when talking naturally. The empty seats discourage flamboyant oratory. The men on hand include most of those with any especial knowledge of the particular subject under consideration, as well as those to whom it has any especial interest. Little time is lost through the intrusion of speakers who would be tempted by a large audience to display their superficial knowledge or make a bid for notoriety. Always the larger the attendance, the more the likelihood of useless talking. With a small attendance everything conduces to work that is as quick as may be consistent with thoroughness and with fair play to all the interests concerned, whether those interests are what is

[1] *Commentaries on the Constitution of the U.S.*, sec. 835.

misleadingly called public or private. Herein lies the reason why much good and no serious harm has come from the quorum rule in the British House of Commons, although under it twenty-one out of 707 members can commit that body to the enactment of law, as may happen in an extreme case. At first sight that might seem altogether wrong, but the result justifies.

The work of Congress largely consists of handling administrative questions — matters of business detail. For these it is quite sufficient to secure such decision as would be reached by a large board of corporation directors. Other problems are akin to those that in the courts we expect will be adequately determined by juries of twelve men, but as we generally require juries to be unanimous in their findings and legislative bodies act by majorities, problems of this class may well call for consideration by four or five times the number of a jury, though not by twenty times that number. The real occasion for large attendance comes only when important party issues or questions of public policy are at stake. No matter how small might be the nominal quorum, at the Capitol in Washington, where electric bells can speedily summon members from their offices, the restaurants, and the lobbies, it is almost always possible to get a sufficient attendance whenever an important discussion is to begin or an important vote to be taken. Only rarely will it be found that the greater part of the members are actually away from the Capitol and the near-by office buildings. In such contingencies if the need were vital, delay could almost always be secured by the use of familiar parliamentary tactics.

Of course something is to be said on the other side. Where reconsideration is part of the system of procedure, the smaller the vote on a measure, the easier it is to get reconsideration the next day. This may cost more time than would be saved by the smaller quorum requirement. Furthermore it is harmful to have deciding votes upon reconsideration cast by men who have not heard the main argument. And the reverse is true, that it is dangerous to have reconsideration voted upon in the absence of many who shared in the original vote. With a low quorum figure, decision reached in a full house may be reversed later by a small house. This was undoubtedly the reason for a rule adopted by the Provincial Congress of Massachusetts, April 20, 1775: "No vote shall be reconsidered when a less number is present in Congress, than there was when it was passed." That such a rule has

had no general adoption suggests the difficulties in which the subject is involved.

Argument in this field cuts both ways. To my mind the worst result of the quorum situation in Washington is the number of votes cast by men who have not heard the discussion. Examination at random of one hundred roll-calls in the House of the 66th Congress (1919–21), compelled by calling the attention of the Chair to the absence of a quorum as disclosed by a rising vote, shows that the average attendance just before the roll-call was 122, and that the call resulted in an average of 286 votes. Some members had heard part of the discussion and then left the chamber, but it is safe to say that more than half of those who shared in the decision had listened to none of the debate. This is nullification of the very purposes of parliamentary discussion. On the questions of medium importance, where few members are fully informed and have independently made up their minds in advance, the issue depends partly on chance, chiefly on the practice of following committees or party leaders. When the bells bring in the absentees, they ask if it is a party vote, or, if not, whether "Aye" or "No" is "with the committee." It is this that gives committees exaggerated power, making it almost impossible to upset the report of a unanimous committee, and very hard to defeat the majority of a divided committee. The indirect effect is that many members come to look on the greater part of debate as a futile waste of time, and refuse either to take part or to attend. Thus the quorum rule thwarts itself by diminishing rather than increasing ordinary attendance.

Balancing considerations, it seems to me that gain might well be sought in modifying the quorum requirements as they are found in American practice. Already we admit the force of the arguments for this by giving them practical effect, though illegitimately. We actually do a great part of our work without the presence of a quorum. Not only is it the general practice thus to proceed unless somebody makes the point of order, but also it is not rare to provide against that point. For example, in the New York Assembly Friday is made a short day and used for advancing bills under agreement that the point of no quorum shall not be raised and that if any member demurs, he may have reconsideration in the following week.

Although the Federal Constitution unequivocally directs that a majority shall constitute a quorum to do business, the very

rules of the House of Representatives defy this injunction, for they provide that one hundred, less than a quarter of the full membership, shall be a quorum of the Committee of the Whole. Of course the pretense is that such a committee is not the House itself, but this is nothing other than a pretense — an evident fiction sustained in this particular for the palpable purpose of evading the Constitution. Nine tenths of the important work of the House is really done in Committee of the Whole. To be sure the Committee goes through the formula of rising and reporting to the House itself, which thereupon takes the decisive action. Theoretically new amendments may be offered in the House and debate may there take place, but almost always this is cut off by the previous question, save for a single motion to amend through the artificial process of moving to recommit with instructions to report back forthwith, with the amendment specified. This gives opportunity to insist upon the presence of a majority of the membership, and the demand is usually and properly made.

Not only our Constitutions but also the rules of our legislative assemblies habitually yield to the requirements of convenience and the dictates of common sense. For example, take the very first rule of the National House of Representatives, directing the Speaker to proceed "on the appearance of a quorum," and the first rules of the Massachusetts House and Senate, containing the same provision. It is ignored in all three of these bodies, and probably everywhere else in the United States. A member of the 66th Congress who doubted the presence of a quorum before the Chaplain had begun his prayer was thought to have outraged the proprieties by violating all traditions.

In this particular the House of Commons is more considerate, for the Speaker there is not presumed to give thought to so worldly a matter as attendance until after prayers. Then, however, his duty goes beyond American practice. Standing in the Clerk's place, he counts the House, and if he finds a quorum present, announces the fact by taking the chair. If there are not forty present, he waits until that number arrive; if they do not come by four o'clock, he retires and no sitting takes place that day. Under no other circumstances is he expected to take the initiative. Ancient custom demands that he shall be blind until the words of some member open his eyes. What follows when the attendance dwindles is illustrated in a story told of a particularly dull statesman who, when he arose to address the Chair,

had the entire chamber to himself. He opened ironically. "Mr. Speaker," he said, "look at the condition of the benches. Is it not disgraceful that the weighty topic on which I propose to address the House has not attracted even the presence of a quorum?" "Order! Order!" cried the Speaker. "Notice having been taken that there are not forty members present, strangers will withdraw." The bells rang out their summons, but no one answered. In another minute the Speaker disappeared behind the chair and the session was over.[1]

Some at least of the Continental assemblies meet the needs of the case better, in my judgment, than those of England and the United States. In France it is held that the presence of a quorum is not necessary for deliberating, but only for voting, and even for voting the requirement can be escaped. Whether or not a quorum is present at the opening of a sitting, the work begins. When occasion comes for a vote, if a quorum is not found to be present, the vote may be put off to the end of the day or to the next sitting. Then the result will be valid whatever the number voting. So if decision at once is desired, the President adjourns the House, in ten minutes calls it together again, and then takes a vote sure to be valid.[2]

Not quite so flexible, but still a great gain over English and American practice, is that of Italy. There the President of the Chamber is not bound to see that a quorum is present unless he is asked so to do by ten Deputies.

Still another line of relief is that followed in Spain. There in the lower branch of the Cortes, with between four and five hundred members, seventy suffice to make a house, i.e., transact business. That number is enough for any routine other than the definitive vote on a bill, which requires the presence of an absolute majority.

Japan took much the same course by specifying that the times for requirement of a quorum shall be the opening of debate and the taking of a vote. Panama is more explicit: "The second debate on a bill shall not be closed, nor shall the bill be voted on in a third debate, without the presence of a majority of the members composing the Assembly."

These methods suggest that simple and feasible remedy for

[1] Michael MacDonagh, "The Quaint Side of Parliament," *Nineteenth Century*, February, 1898.

[2] Eugène Pierré, *Traité de Droit Politique*, sec. 983 (1908)

the troubles of our Houses is not beyond the pale of reason. If we see fit to search for such remedy, we shall find that we can choose among: (1) the small quorum for everything, as in England; (2) the small quorum for all but the decisive business, as in Spain; (3) no quorum requirement save for specified steps, as in France, Japan, and Panama; (4) postponement of decisive action if a quorum is demanded, as in France; (5) refusal to take note of the absence of a quorum save on the demand of several, as in Italy; (6) enlargement of the power and responsibility of the presiding officer.

To change our quorum specifications would everywhere require constitutional amendment, and this would be difficult, for Congress practically impossible, to achieve. Therefore, we must proceed along the line suggested by the realities of the case, for we do now transact the greater part of our business without regard to the constitutional requirement, either avowedly as with the rule for a quorum smaller than a majority in Committees of the Whole (at least in the National House), or tacitly by taking no formal notice of the absence of a quorum unless on the demand of some member. Development in this direction might take the form of a rule that upon discovery of the absence of a quorum except at a decisive stage, the House should automatically be dissolved into a Committee of the Whole, proceeding, however, as if it were a House, until the appearance of a quorum, when decision votes confirming action while sitting as a Committee could be taken. Coupled with this might be a rule to permit Committees of the Whole either to proceed without a quorum or upon discovery of its absence to report to the House and get a quorum, as the majority might see fit.

The other possible line of development is toward the Italian device, of refusing to entertain doubt of the presence of a quorum except on the demand of several members. Probably it would be impossible to go the whole distance of the Italian rule, for we are jealous, perhaps unduly jealous, of the privilege every member has of calling attention to violations of order, and particularly of constitutional order. Rather than even appear to encroach on this privilege, we have endured the grossest abuse of individual power. Probably there has been no more flagrant instance of this than that furnished by the House of Representatives in the 66th Congress (1919–21), where one Representative was responsible for 126 quorum calls and another for 33, thus

between them wasting at least two weeks of the term. It is unnecessary to impugn their motives. Assuming that they acted with purposes disinterested, public-spirited, honorable, yet were the results costly and grievous.

Nevertheless the suggestion that a presiding officer be empowered to ignore a point of order unless raised by several members in conjunction, is so foreign to our parliamentary habits that an advocate could hardly hope for its unqualified acceptance. Yet to some degree the idea could be logically applied. It is the duty of a presiding officer to maintain order. He is expected to do this upon his own initiative in all matters of decorum. If in other matters he is thought to ignore transgression, we now say that any one member may call upon him to act. Why any one member rather than several members in conjunction? The answer is clear in matters of high constitutional privilege. Every member has taken oath to support the Constitution and every member ought to have the right to demand the observance of that instrument. So if any member sees the House attempting "to do business" in the absence of a majority, he should have the right to protest.

This brings us to the question of what "to do business" means. Already we interpret it in some connections as implying the word "decisive," or some equivalent, before "business." If this interpretation is ever justifiable, it is always justifiable. Hence it follows that whenever the business of the moment is not decisive in character, we may without violating the Constitution in the particular in question lay down any rules we see fit.

A permissible remedy, therefore, is to stipulate that except at decisive stages, the Chair need not recognize the point of "no quorum." In the National House such decisive stages would be votes on motions to lay on the table or postpone indefinitely, on adopting a conference report, on ordering to engrossment and a third reading, and on passage. At other times a specified number of members, say five, eight, or ten, might be empowered to require the Speaker to get a quorum, or it might be left to his judgment (subject to appeal) to determine when it may be desirable to set the bells a-ringing and bring in absentees. The crux of the matter is that at present any one of 434 men may exercise such judgment, without recognized responsibility, perhaps impelled by passion, pique, prejudice, vanity, or other motive that would rarely sway the Chair. Would it not be better to vest

the exercise of such judgment mainly in the man chosen from his fellows as the best fitted to guide their deliberations, and from the very nature of his office sure to be more than ordinarily calm, prudent, judicious?

The most desirable thing of all would be to take the quorum requirements out of our Constitutions. They were unwisely put into the organic law. Much better would it be to leave all matters of procedure to the rules of legislative bodies, subject to change from time to time as conditions change. Removal, however, is too much to expect, at any rate in the matter of the Federal Constitution, which turns out to be virtually beyond amendment save in point of great questions arousing general interest. Even the States prefer condoning evasion rather than bother with remedying relatively small defects in technique. For example take the New York requirement that a bill on final passage shall have the assent of a majority of the members elected, the question to be taken by Yeas and Nays, which shall be entered on the Journal. This is evaded by the pretense known as "the short roll-call," one feature of which consists of fictitious entries on the Journal. Such palpable malfeasance led to an enactment directing the presiding officer of each House to certify to the presence of a constitutional quorum, and to passage by a constitutional majority. No bill was to be deemed passed unless so certified, and the certificate was to be conclusive evidence of the fact of passage. The courts helped to make this futile by declaring in some cases that the certificate could not control the Journals, though in another case holding the contrary.[1] So the Constitution is still dominated by what the Assemblymen think to be reasonable. Dangerous doctrine that, but significant!

The Germans are more discreet when they say in their Constitution of 1919, "The quorum to do business will be regulated by the rules of procedure."

If our quorum requirements are to remain unchanged, on the ground that their purpose is wise, at any rate that purpose ought then to be achieved. A quorum ought to be not only secured, but also held. In Congress no attempt is now made to go beyond getting a majority of the members to answer to their names. Many disappear as soon as they have responded, so that often no quorum will in fact be within the chamber when the call of the

[1] 96 N.Y. Supp. 876; 97 N.Y. Supp. 336; 185 N.Y. 107; 134 N.Y. Supp. 770; 138 N.Y. Supp. 1120.

roll ends. The doorkeeper has been ordered to close the doors, which is supposed to mean that members may be let in but not let out. As a matter of fact only the main entrances are shut, the lobby doors being as free as ever. None but the novice thinks of laughing at the farce. Massachusetts does the thing better. Once inside, a member has to stay until the Speaker orders the doors opened or benevolently responds to an individual appeal presented in the shamefaced way of a schoolboy asking that he may be excused. Legislators are a good deal like schoolboys anyhow. A little discipline now and then does them good.

CHAPTER III

THE BEGINNING OF BUSINESS

At the opening of the fourteenth century, when what we now know as Parliament had taken shape, almost all legislation was originated by the King. At the close of that century the petitions of the Commons seem almost to have engrossed the power of initiation.[1] The custom of presenting private petitions to the Commons, desiring them to use their influence with the King, came in first under Henry IV, in the early years of the fifteenth century. These petitions were in the nature of what are known in England as private bills, matters half legislative and half judicial. Next to nothing can be learned of their routine, nor is more known of the procedure in the weightier matter of what were called the "common petitions" of the House. Undoubtedly, however, they went through the stages that appear to have been well established when the Journals begin.[2]

For a century and more it was the custom of the King to answer all the petitions of the Commons at the end of the session. Those to which his reply was favorable were then turned over to the law officers of the Crown for the framing of statutes. These officers did not hesitate to shape the statutes to suit the fancy of the King, perhaps to engraft their own notions, or even to frame laws in pretended response to petitions which in fact had never been made. Hallam gives an instance of this kind of fraud. An ordinance was put on the roll of Parliament, in the fifth of Richard II, empowering sheriffs of counties to arrest preachers of heresy and their abettors, and detain them in prison till they should justify themselves before the church. This was introduced into the statutes of the year; but the assent of Lords and Commons was not expressed. In the next Parliament the Commons, reciting this ordinance, declared that it was never assented to nor granted by them, but what had been proposed in this matter was without their concurrence (that is, as Hallam conceives, had been rejected by them), and prayed that this statute be annulled; for it was never their intent to bind themselves or their descendants to the bishops more than their ancestors had been

[1] Stubbs's *Const. Hist.*, II, 590.

[2] *Ibid.*, 459 *et sqq.*

bound in times past. The King returned an answer, agreeing to this petition. Nevertheless the pretended statute was untouched, and remains still among the laws; unrepealed, except by desuetude, and by inference from the acts of much later times.[1]

That sort of thing became a bitter grievance with the Commons. They constantly complained of the trickery, and at last, in 1414, Henry V conceded the point for which the Commons had repeatedly pressed. They prayed "that there never be no law made and engrossed as statute and law neither by additions nor discriminations by no manner of term or terms which should change the sentence and the intent asked." And the King in reply granted that from henceforth "nothing be enacted to the petition of the Commons contrary to their asking, whereby they should be bound without their assent." This concession led to an important change in the method of framing statutes. It became the practice to send up to the King, not a petition, but a bill drawn in the form of a statute, so that the King was left no alternative beyond assent or dissent.[2]

The custom had been followed in the legislative acts originating with the King. He had been wont to lay the law before the Houses in the form it was ultimately to take. Then the example was followed in private petitions containing the form of letters patent to which assent was asked. It was found a convenient course by the Commons in their grants and by the King in bills of attainder. Naturally the next step was its application to all kinds of legislation, and from the reign of Henry VII it was used in most of the important enactments.

A member of the House of Commons wishing to introduce a bill, made a motion for leave to introduce. This might give rise to a debate over the evil alleged and the need for legislation. If the motion prevailed (it was rarely refused), there might follow the selection of a small body of members in the nature of a committee, with some one as spokesman, usually the maker of the motion. In response to the Speaker's question, the mover would name his colleagues and go down to the bar of the House for the purpose of retiring with them to some suitable place where they could deliberate and prepare the bill. This process has been greatly shortened. The old practice of a motion for leave to introduce is still usually followed in the case of the more important measures brought in by the Government, and

[1] *Middle Ages*, pt. III, ch. VIII. [2] Sir C. P. Ilbert, *Parliament*, 22.

sometimes in the case of bills introduced by private members, but the more frequent practice is that made possible by an alteration of the rules in 1892, permitting any member to introduce a bill after formal notice of his intention. Whether he has obtained the requisite leave, or given the requisite notice, the Speaker, at the proper time, calls his name and thus invites him to present his bill. He does so by bringing to the table where the Clerks sit, a document supposed to be his bill, but which is really a "dummy" or sheet of paper, supplied to him at the public bill office, and containing the title of the bill, the member's name, and the names of any other members who wish to appear as supporting him or joining with him in presenting the bill. The Clerk at the table reads out the title of the bill, and it is then supposed to have been read a first time. A formal order is made for printing it, and a day is fixed for its second reading.[1]

Any member wishing to introduce a public bill may on the first two days of the session enter his name on a numbered list for that purpose. On the third day lots are drawn, and members in the order chosen set down their bills for the various Fridays of the session available for private matters. Only the few who are fortunate enough to draw places early in the session have any real chance of getting action. The result is that a year's work produces but a trifling number of acts of Parliament due to the initiative of members not belonging to the Government. Much fault is found with the system. Mr. Asquith told the Select Committee on House of Commons Procedure in 1914 that it was thoroughly bad, and there was nothing to be said for it. He thought a much more satisfactory way would be to see what amount of backing the various proposals had among the private members.

To the same committee Mr. Balfour made suggestions looking in the direction of a return to the old practice under which as a rule bills were introduced on resolutions. Sir Courtenay Ilbert demurred against this, holding that the procedure would waste time, and that it would impair the responsibility which ought to rest with the proposer of a bill, and especially with the Government, for putting forward a scheme in the definite form on a bill, instead of suggesting resolutions. He believed, however, the balance of advantage to be in favor of a general discussion on the principles of a bill before its details were discussed in Committee.

In Canada, and probably in all the other English dominions

[1] Sir C. P. Ilbert, *Parliament*, 70.

with lawmaking bodies, the English practice is followed. A Canadian member must hand to the Clerk a written notice of his bill, which notice appears in the record of the proceedings. Two days later it is in order to ask leave by written motion to introduce the bill, and such leave is usually granted, although it may be refused by the House. If leave is granted, the Clerk turns the bill over to the Law Clerk for revision before it is sent to the printer.

The indications are that in the American colonies deviation from the strict letter of the English practice came early. One of the rules adopted for the Pennsylvania Assembly of 1703 began: "That Bills to be pass'd into Laws, may be brought in by any particular Member, or received by them, or the Speaker from others, and presented to the House, who is to order the Clerk loudly to read them; and after reading, to be respectfully delivered to the Speaker, and him to mark and note (by Breviate or otherwise) all Bills, and declare the Nature and the Use of the same, which, if not rejected, to cause to be read a second Time." Here there appears no trace of the motion for leave to introduce. Note also that the Speaker might receive bills "from others." However, such freedom did not become general. E. P. Tanner says that in the General Assembly of New Jersey during the first part of the eighteenth century bills were sometimes brought in by private members upon permission given by the House, but the nature of the more important matters was decided upon in Committee of the Whole, and special committees were named to prepare them.[1] R. V. Harlow, citing colonial Journals of the period between 1750 and 1765, concluded that it was not the custom for an individual member to lay bills before the House on his own responsibility. He might move that a bill be brought in, or he might ask permission to introduce a measure; but in every case a select committee would be appointed to prepare a draft.[2] Harlow excepted the Virginia House of Burgesses.

In Pennsylvania the original practice is found a century later. A rule in the House Journal of 1805 said: "Any member may read a bill in his place, and by permission of the house present it to the chair; it shall then be proceeded upon as if presented by a committee." However, the right had come to be restricted by requiring leave to be obtained. Few bills were introduced in this

[1] *The Province of New Jersey*, Col. Univ. Studies, xxx, 340.
[2] *Legislative Methods in the Period Before 1825*, 21.

manner; nearly all were presented by a committee pursuant to order. So strong was the feeling that measures introduced should first be subjected to review, that later the privilege of introducing bills in place was withdrawn.[1]

In the New York Senate the introduction of bills from the floor was permitted as early as 1808. At first the method was employed but little. The great bulk of the measures proposed came into Senate or Assembly by way of petitions. These went to a standing committee and upon its favorable report a select committee was appointed to bring in a bill, which went to the Committee of the Whole. A bill introduced on leave given to a member escaped this circuitous process, going directly to the Committee of the Whole. This encouraged introduction on leave, and in the course of time the calendar of the Committee of the Whole became so encumbered that it was necessary to require the reference of everything to standing committees.

In the Continental Congress a bill could be introduced only by order of the House on the report of a committee, or by giving a day's notice of a motion for leave, which motion itself could be committed. The first Congress of the nation made this rule: "Every bill shall be introduced by motion for leave or by an order of the House on the report of the committee; and in either case a committee to prepare the same shall be appointed. In cases of a general nature, one day's notice at least shall be given of the motion to bring in a bill; and every such motion may be committed." At first motions for leave to introduce a bill were very rare, the habits of the House inclining rather to let a committee draft the bill on jurisdiction conferred by the reference of a petition or by a resolution of the House instructing it so to do. Such instructing was rare and took place only on matters of grave moment. In the course of time the habit of instructing grew, tending to reduce the committal of a bill to a mere formality, for it left the committee without power to alter. In December of 1827 it would seem that some member tried to escape committee scrutiny, and the Speaker was embarrassed, or so it was suggested in debate, because as a Virginian he was familiar with the practice in his House of Delegates, where any individual was permitted to introduce a bill on his own authority. To meet the situation it was moved to substitute for the existing rule, one reading, "No bill shall be introduced except upon the report of a

[1] H. W. Dodds, *Procedure in State Legislatures*, 26–27, note.

committee." In the discussion that followed,[1] much uncertainty developed as to the meaning of the existing rule, but the House was unwilling to dispense with the opportunity in case of emergency to get a bill under discussion without preliminary study by committee. The motion was therefore laid on the table.

Ten years later the Speaker declared that from the beginning of the government few cases were to be found (he believed but two or three) of bills brought in on motion for leave. From that time on, however, the practice grew. Sometimes, as once in February, 1837, a motion for leave would be debated for several days. This led in 1860 to provision that bills should be referred to committees without debate.

The object of the rule requiring notice was that any member who wished to speak at the moment of introduction might be prepared so to do; and to prevent any member from introducing a bill and having whatever action he might see fit to take in connection with his motion spread upon the Journal when such a motion might be distasteful to the majority. There were at the start no standing committees save those on routine matters. A special committee had to be named for every bill and there was ground for precaution. Although the ground disappeared, the original requirement remained in the rules of the House until 1880, but its observance had been so neglected that in 1879 several old members, including the Speaker, could not recall that a point of order on this score had ever been raised. Hinds, however, found an instance to the contrary three years before, though no doubt it was exceptional. Since 1880 no notice has been required. Pennsylvania dropped it in 1843. The New York Assembly in 1868 adopted the method of introduction on call of counties. Some of the Legislatures still call for notice, but it has become an idle formality.

Other relics of the old procedure survive here and there in lifeless, cumbersome formalities. They attest the difficulty in getting rid of outgrown practices. There is no longer any logical reason of consequence for any discrimination whatever between bills introduced on leave and those accompanying petitions. If it be argued that introduction on leave implies some personal interest and responsibility on the part of the member introducing, the answer is that neither committee nor House pays any atten-

[1] *Debates in Congress*, IV, pt. 1, 823.

tion thereto. As a matter of fact bills introduced on leave come so often from outside that the suggestion of interest and responsibility is itself deceptive. In Congress attempt has been made to avoid this by permitting the words "on request" to be printed in Journal and Record with the title of a bill introduced on leave. The Senate does this without authority of rule, but the House definitely provided for it in 1888. It has, however, never been the practice of the House to permit the names of the persons requesting the introduction of the bill to be printed in the Record. Yet there is no reason why these names should not appear precisely as in the case of a petition. In Iowa when a member introduces a bill for which he does not wish to be held responsible, he explains that he does it "by request." If the words are endorsed on a bill in Pennsylvania, they are said to be its death warrant, for the members argue, cogently enough, that if the sponsor of a bill is anxious to dissociate his personality from it, there must be something wrong somewhere.[1]

In the Massachusetts Legislature, and very likely in the Legislatures of other States with similar customs, discrimination leads to certain confusing and needless technicalities that puzzle new members and sometimes get veterans into trouble, without accomplishing any useful purpose whatever. When a bill is introduced on leave, the committee to which it is referred is to pass judgment on that particular bill, and in House and Senate that is the bill which must be accepted or rejected, subject, of course, to amendment not changing its general purpose. If reported adversely by the committee, the question is, "Shall this bill be rejected?" That of itself is unfortunate, for it calls upon members to say "Yes" when their minds are running in the negative channel. However, the more important thing is that the whole subject is not brought before the House.

In the case of a petition, on the contrary, the petition governs and not the accompanying bill. The petitioner may make his request as broad as he pleases and anything within its scope may be reported, quite regardless of the contents of the bill the petitioner has drafted. The result is that the shrewd legislator will almost never introduce on leave, for he can accomplish his purpose with much more safety by petition, save in the rare cases when he says to himself, "I want this particular bill or nothing." Since it is far wiser to have the committee decide what particu-

[1] Samuel Bryan Scott, *State Government in Pennsylvania*, 19.

lar form of legislation is best, individual members ought not to have the chance to circumscribe action in this way.

All these complications are quite needless. In its customary form the device of introduction on leave no longer serves any good end and ought to be wholly discarded. If preliminary examination or judgment is deemed desirable, it should be sought in some other process. To-day the technicalities of the system breathe too much the spirit of hostility and defense. They suggest that the Legislature is to be on its guard against the attacks of individuals. Would it not be better to abandon that attitude and ask always, "What does the public need?" rather than, "What does this man want?" Public bills ought to be looked on merely as formal suggestions of a way to meet a public need, and the Legislature ought not to hamper itself in meeting that need as it may see fit. Private bills differ somewhat in this particular, but not enough to justify the Legislature in precluding itself from righting a wrong after such fashion as may commend itself.

In Congress the olden theory that the letter should govern wastes time and works harm in one matter of seemingly trivial detail. Customarily committees report the original bill, "with amendments" specifically set forth. This compels going through the motions of approving even grammatical changes, besides inviting discussion of minor particulars on which the judgment of the committee would better be accepted ordinarily without question. The custom pays altogether too much attention to the judgment of the man who drew the original measure. The really important thing is what the committee recommends. Simpler and in every way better is the Massachusetts practice of reporting "in a new draft" whenever changes are made.

Whatever tends to individualize legislation, so to speak, is of doubtful expediency. For this reason one may question the wisdom of the rule in Delaware to the effect that a bill or joint resolution is not to be passed upon in the absence of the member who introduced it, without his written consent. The impulse prompting the rule was commendable, for Fair Play fathered it and Courtesy mothered it. Yet it too much suggests personal rather than common ends.

Once in a while the Legislatures accept a new idea worth while — inadvertently, the cynic would say. For example, New Jersey was rash enough to encourage good legislation by adopting a rule that reads: "Each member when introducing a bill shall sub-

mit with each copy a statement setting out the objects proposed to be accomplished by its enactment and the localities or persons the bill will effect, which statement shall be referred to the committee with the bill." These statements are pasted on the printed copies of the bills in the hands of the members, and, although not considered an integral part of these documents, are very helpful to all. A recent Speaker reports that the rule has been particularly useful in cases where the statute proposed contains no language except that repealing an existing law. The Wisconsin House requires a like synopsis to be presented with the bill, but it does not appear on the printed copy.[1]

In the matter of handling bills upon their introduction, Congress has made commendable advance, driven to it by the steady growth of business. The reading of memorials and petitions came to make great drafts on the time of the House. In 1837 the introduction of bills was confined to one of the morning-hour calls. The presentation of petitions had been restricted to Mondays, excepting during the first six days of the session, when they were in order every day. The time available was still further encroached upon in 1838 in the interest of other business. Petitions relating to slavery brought the matter to a head. In 1842 John Quincy Adams, who had been unable for a long time to present petitions and had a hundred and fifty of them in his desk, successfully moved that they might be handed to the Clerk, endorsed with the reference or disposition to be made of them, subject to the control and direction of the Speaker. The flood that followed took twenty-three pages of the Journal. The slavery petitions went to the table on the objection of the Speaker, but Adams had solved the problem of presenting petitions without consuming the time of the House.

Like difficulties brought a like solution in the matter of private bills. In 1870 those relating to post routes were directed to be thus treated; in 1879, river and harbor bills were included; and in 1887, all other private bills. Then in 1890 came the admirable extension of the system to cover all bills and reports of committees, a reform estimated to have saved from three to five hours a week, very nearly a working day. Speaker Reed, who was responsible for this, described the evil and the remedy. Previously, he said, amid a confusion which could not be controlled — for nobody cared anything about other people's bills — the title was

[1] H. W. Dodds, *Procedure in State Legislatures*, 35.

read by the Clerk, the Speaker caught what he could of it, while members claimed his attention on both sides of the chair, and with the aid of the Clerks he disposed of it as well as he could. "Naturally there were many misreferences, though they were seldom heard of because there was no chance of correction. At present the bills are referred with deliberation and accuracy. Of course there are still errors, because the titles of the bills may mislead, and the jurisdiction of committees is not always clear; but all important errors are corrected, because the committee that ought to have a bill can demand it, and one that ought not to have it, can send it, if the House approves, where it belongs." [1]

The marvel is that so sensible a solution of the problems was so long delayed. Equally astonishing and grievous is it that so many of the State Legislatures have not yet applied the same remedy. The Massachusetts Special Committee on Legislative Procedure advised it in 1915, citing with approval the rule of the Virginia House to the same end. The Committee pointed out that the present procedure is purely perfunctory, yet consumes a great deal of valuable time, especially at the beginning of the session, which might be better used in committee hearings. It believed that as soon as members were elected, they should be notified that all petitions must be filed three weeks before the convening of the General Court. The Clerks should have the accompanying bills printed and tentatively assigned. A printed list of all petitions, together with the committees to which they were referred, could then be presented on the opening day, printed in the next day's Journal, and sufficient time, such as one or two legislative days, might be given in which members could object to references and move to refer to some other committee. Thus the Legislature would be ready for business the first week of the session. The technical objection, that a Legislature cannot receive petitions before it is in existence, could be taken care of by considering the presentation of the printed list on the opening day as the formal introduction and reference. "If a business man opens a new mercantile establishment," said the committee, "he does n't pay a force of clerks weeks before he puts in his stock of goods. If he starts a new manufacturing plant, he does n't pay his operatives before his machinery is installed and his raw material secured."

As it is now, members rarely take advantage of their only

[1] T. B. Reed, *No. Am. Review*, May, 1890.

right, which is that of objecting to the reference the Speaker has made. This right is saved by the Virginia practice of placing on every member's desk a printed list of the matters presented and referred on the previous day. Then a motion to reconsider the reference can be made. The Massachusetts Legislature at this writing has done nothing about it. The time-honored waste of time continues there as in most of the Legislatures of the land. It is such obstinate adhesion to outgrown processes, now costly and stupid, that accounts in no small part for the disrepute into which Legislatures have fallen.

Maine has even taken a step backward. Not long ago it created a joint standing committee on the assignment of bills, consisting of one Senator, two Representatives, and the President and Speaker *ex-officiis*. If this was for the purpose of hampering the presiding officers by taking away some of their power of reference, as presumably was the case, it was none the less an ill-advised step. To dilute responsibility is not the way to reform our legislative bodies. To make their processes more cumbersome and dilatory is reactionary rather than progressive.

Preliminary Judgment

Something could be said for the ancient methods of introducing if they any longer served to check the admission of trivial or hopeless proposals. No such effect is now to be seen. Remedy must be sought in some other direction. Is it to be found in preliminary decision as to what shall be considered?

The idea is not new. On the contrary, it appears in the earliest days of democratic government. In Athens a part of the ordinary business of the first assembly held each year was to receive the proposals that might be made by individuals for a change in the existing laws. If these seemed sufficiently well grounded to merit further investigation, the third ordinary assembly of every year might direct the appointment of a committee on legislation drawn by lot from the whole body of the jurors, to compare the relative merits of the old law with that proposed to be substituted.[1] Pericles probably introduced the indictment for informality or illegality that might be brought against the proposer of any law or decree, and render him liable to punishment. He was required, in bringing forward his new measure, to take care that it should not be in contradiction with any preëxisting law, or if

[1] Connop Thirlwall, *Greece*, II, 46.

there were any such contradiction, to give formal notice of it — to propose the repeal of that which existed — and to write up publicly beforehand what his proposition was, in order that there might never be two contradictory laws at the same time in operation, nor any illegal decree passed either by the Senate or by the public assembly. As this had developed by the time of Demosthenes, the mover of a new law or decree, even if it had been regularly discussed and passed, was liable to be indicted, and had to defend himself not only against alleged informalities in his procedure, but also against alleged mischiefs in the substance of his measure. If found guilty, the accuser suggested the degree of punishment, the accused did likewise, and the dikastery chose one or the other, with no modification permitted, so that it was the interest even of the accused party to name against himself a measure of punishment sufficient to satisfy the sentiment of the dikasts, in order that they might not prefer the more severe proposition of the accuser. At the same time, the accuser himself, as in other public indictments, was fined in the sum of one thousand drachmas, unless the verdict of guilty obtained at least one fifth of the suffrages of the dikastery. The personal responsibility of the mover, however, continued only one year after the introduction of his new law; if the accusation was brought at a greater distance of time than one year, the accuser could invoke no punishment against the mover, and the sentence of the dikasts neither absolved nor condemned anything but the law. Their condemnation of the law, with or without the author, amounted *ipso facto* to its repeal.[1] Aristophon, toward the close of his political life, made it a boast that he had been thus indicted and acquitted seventy-five times.

In recent centuries there have been few appearances of procedure even faintly resembling this, which of itself casts doubt on the utility of the Athenian method, for men have not permanently abandoned sound political processes. The nearest approach to the Greek method may have been in Scotland, where a committee known as the "Lords of the Articles" appears to have been introduced by David II in 1637. Its business was to prepare all matters for discussion in Parliament, and gradually, with some few exceptions, the rule became general that nothing was laid before Parliament without the previous recommendation of this committee. Parliament having only the right of ac-

[1] George Grote, *History of Greece*, pt. II, chap. 46.

cepting or rejecting in its entirety any measure proposed by the Lords of the Articles, without the power of amendment, these Lords were practically able to force any obnoxious proposal through Parliament by "tacking" it to some bill of vital importance. It was by the employment of tactics such as these that Charles I succeeded in procuring the acceptance of his new Prayer-Book by the Scotch Parliament, in spite of their repugnance to the innovation. The Stuart Kings, moreover, acquired such complete control over the election of the Lords of the Articles that they degenerated into mere instruments of misgovernment. The very name became hateful, and one of the first acts of the Convention Parliament, which met in 1689 to reconsider the Constitution, was to abolish them.[1]

Preparation rather than selection was the development characteristic of the early English Parliaments. Naturally, and under the conditions of the time not unwisely, recourse was had to the help of the judges. "Do not gloss the statute," remarked the Chief Justice to counsel in 1305. "We understand it better than you, for we made it." The practice lasted as late as the sixteenth century, the year-books of the reign of Henry VII showing that the main principles of his legislation were formulated by the judges in common session before submission to either House. In the reign of Henry VIII it was the custom of the Lords in Parliament to secure copies of bills that had been introduced in the House of Commons and to take the opinion of the judges upon them before they were sent up from the lower House.[2]

Of course to-day the great example of preliminary preparation and of introduction under responsible auspices is that of cabinet government in England. Since the ministry is to stand or fall by its policies, these are carefully weighed and planned in advance. The more important measures are framed by a committee of the Cabinet and then debated by the Cabinet as a whole before presentation to Parliament. Bills of lesser importance are prepared by the experts of the departments. In Parliament itself private members may still introduce bills, but with infinitesimal chance of success unless they are wholly inconsequential or by rare fortune happen to meet with Government favor. To all practical intents and purposes the legislation of England is officially pre-

[1] B. C. Skottowe, *Short History of Parliament*, 149–51.
[2] A. F. Pollard, *The Evolution of Parliament*, 34.

pared and introduced. The situation is much the same in the English dominions, where likewise the individual member has little motive to assert his nominal rights. The result is that in a Canadian Legislature, for example, less than a hundred and fifty bills will be introduced in a session.

France devised the idea of having the Chamber of Deputies, upon its division into Bureaux by lot each month, create anew a committee known as the "Commission d'Initiative," with twenty-two members, which should examine every bill coming from either a Deputy or a Minister, and decide whether it should be considered. Only a vote of emergency taken upon the introduction of a measure was to save it from the scrutiny of this committee. The system proved a failure. The Commission d'Initiative is now practically obsolete, all bills, whether presented by the Government or by individual members, being referred immediately to one of the standing committees. The situation is not satisfactory. For a generation there has been complaint about the abuse of the power of individual initiative. The demand every three or four years for reform in the rules of the Chamber has been largely due to the full scope given to the theory that every member should have all opportunity to introduce legislation and voice grievances. The urgency motion is chiefly used for this. Each Deputy has the right to mount the tribune and explain briefly the need for immediate action on his bill. The privilege is grossly abused and is said to have made the Chamber thoroughly inefficient.

In Switzerland, the Executive Council, of seven members, elected for three years by the Federal Assembly, submits to the two Houses at the opening of the session a detailed list of all business for the attention of the Assembly, whether it originally was forwarded by the Assembly, or submitted by the States of the Confederation, or came from private persons. Akin to this was the usual procedure in Germany, where bills were prepared and adopted in the Bundesrath and then sent to the Reichstag. If there passed, they went back to the Bundesrath for final approval. In the Reichstag fifteen members had to agree in order to introduce a bill that did not come from the Government. Drafts of important measures were almost invariably published long before they went to the Reichstag, in order to get the widest criticism, and as a result thereof were often revised or even withdrawn. At this writing it is not here known how much the recent

political changes may have modified parliamentary practices. In principle any change in the way of improvement would be hard to conceive. It would be greatly to the gain of our own legislation if such a process for widespread criticism in advance could somehow be secured.

The new German Constitution (1919) contains a novel provision. District workers' councils and a National Workers' Council are to meet with representatives of the employers and with other interested classes of people in district economic councils and in a National Economic Council, for the purpose of performing joint economic tasks and coöperating in the execution of the laws of socialization. All substantial vocational groups are to be represented according to their economic and social importance. Drafts of laws of fundamental importance relating to social and ecomomic policy before introduction into the National Assembly shall be submitted by the National Cabinet to the National Economic Council for consideration. The National Economic Council has the right to propose such measures for enactment into law. If the National Cabinet does not approve them, it shall, nevertheless, introduce them into the National Assembly together with a statement of its own position. The National Economic Council may have its bill presented by one of its own members before the National Assembly. This definite recognition of class interests in the formulating of measures for legislative consideration, giving them at the start the great advantage attaching to constitutional protection, suggests possibilities of organized initiative that if generally imitated may profoundly influence lawmaking processes.

A Russian experiment, now nothing but history, throws a side-light on the general subject. When the Duma was constituted, it was provided that every bill must have thirty signatures before it could be offered. It had then to be referred to the particular Ministry within whose jurisdiction its subject-matter came, and the Minister was authorized to substitute for it another bill, covering perhaps the same ground, but in a different way. This substitute bill was the one that the Duma must act upon, and the member could push his own bill only in case the Government declined to draft a substitute. It was complained that this rule enabled the Government to delay legislation upon any subject almost indefinitely, and, apart from that, forced the Duma to act, not on its own bills, but upon bills prepared for it by the

various Ministries. In the first two sessions of the Third Duma not a single bill introduced by a member was passed, while of the 695 bills introduced or framed by the Government 509 were passed. In the third session two members' bills were acted upon, but neithes of them had any importance. The record for individual initiative was somewhat better in the Fourth Duma, but all bills of first-class importance were enacted by ukase, or, at least, framed and introduced by the Government.[1]

Long before any English Cabinet began preparing for the work of a session of Parliament, Englishmen on this side of the water felt the need of preparation, though not from the same reasons that led to the development in the mother country. An entry in the records of the Massachusetts General Court, for October 17, 1643, reads: "This Court, taking into consideration the necessity of husbanding mens time in this country, & lessening the charges of the Generall Court, have conceived, that it would avoyde the losse of much time if the deputies were chosen for one whole yeare, & that if in every sheire the magistrates & deputies ther inhabiting, or so many as can intend it, did meete at convenient times before every Generall Court to consult of and prepare such businesses as are to bee determined at the same Court, which would much shorten the time which is spent in the Generall Court, & consequently the charge also, this wee have ordered to bee declared to the freemen of the severall townes, that if it shal bee thought fit to put this in practice, an order may bee made at the next Court for establishing thereof; & it is now ordered, that after the deputies for the next Court of Election shall bee chosen, such meeting, as aforesaid, may bee had in the severall sheires, whereby the country may have some tryall of the fruite of that which is now propounded." [2] The records, however, do not show that any action was in fact taken on this at the next or any other Court. The idea sank out of sight, not to come to the surface till our own time. Now it is again urged.

Manifestly as a stricture, in the tone of blame, the Bureau of Municipal Research said in its monograph prepared for the delegates to the recent Constitutional Convention of New York: "In this country, the whole subject of defining and presenting political issues has been left to private initiative." [3] If this means

[1] George Kennan, *The Outlook*, June 30, 1915, p. 1503.

[2] *Records of the Colony of the Mass. Bay in N.E.*, II, 47.

[3] Bureau of Municipal Research, *The Constitution and Government of the State of New York*, 22 (May, 1915).

that the initiative comes always from persons not holding public office, it is not true. Every Message of President or Governor contradicts it. Hundreds of members of Congress or of Legislatures contradict it every year with the bills they present of their own devising. If the Bureau of Municipal Research meant that all ideas of political change start with some individual, it is a truism. No other origin is possible, unless two persons can conceive the same notion at the same instant, which at any rate is mathematically improbable. Political ideas must be born and grow like anything else that lives. To be sure, Minerva, the Goddess of Wisdom, sprang into being fully developed, but that was some time ago. She has no successful imitators nowadays.

Doubtless what the Bureau had in mind was the desirability of responsible judgment preliminary to the submission of a proposal to an assembly. Something of this sort was contemplated by a bill introduced in Illinois in 1913 proposing a joint legislative commission to consist of the Governor, Lieutenant-Governor, Speaker of the House, chairmen of the Committees on Appropriations and on Judiciary of Senate and House, five other Senators and five other Representatives, to prepare in advance of the session a legislative program with drafts of bills on subjects the commission had investigated, to which end the commission was to be empowered to appoint special committees of its own members or of others to study particular problems and draft bills. The measure failed, but it was a symptom.

The next year Governor Emmet O'Neal of Alabama suggested that "it would tend to restrict unnecessary legislation if all bills introduced by individual members should be required to be first submitted to a picked committee before being placed on the calendar."[1] He realized it might be claimed that any restriction of the right of the member to offer as many bills as he pleases would be trenching upon his functions and privileges as a representative of the people. Yet at least, thought the Governor, the member should be required to furnish with his bill a memorandum showing what organization or interest suggested it, the purposes sought to be accomplished, and a brief statement of its provisions, as a condition precedent to its reference to a committee.

Nearly thirty years before this, Woodrow Wilson, writing of Congress, had called attention to the possibility of "entrusting the preparation and initiation of legislation to a single committee

[1] "Distrust of State Legislatures," *No. Am. Review*, May, 1914.

in each House, composed of the leading men of the majority in that House." [1] Note that he would have on such a committee only members of the majority. That is the cabinet idea he has so long and warmly championed. One of his disciples in this particular, Henry Loomis Nelson, urged the same remedy after close observation of Congress. "When the House and Senate," he wrote, "have each a committee, composed of none but members of the majority party, whose business it shall be to select the measures for consideration, who shall be responsible not only for the subjects presented to Congress, but for their purpose and their form, the country will know then, as it does not now, where rests the responsibility for failure or the credit for achievement. Such a reform would not be comprehensive or complete, but it would be a long step forward. It would concentrate responsibility, but no more than power has already been concentrated by necessity arising from existing conditions. The burden of the responsibility is due to those who hold the power as well as to the country. Let us know who frame and direct legislation, and who therefore, under our system as it has been worked out, govern us. This is a reasonable demand, and its grant is essential, for mysterious and irresponsible power leads either to tyranny or anarchy." [2]

Yet no sooner had the propaganda for this theory of government made such headway among us as to become formidable, than it began to be abandoned in the country held up for our emulation. Parliament in 1916 created what was known as "the Speaker's Conference," to consider the subject of electoral reform. This body, over which the Speaker presided, contained thirty-six members, appointed from both Houses, and selected with a view to representing not only the parties and groups in Parliament, but also the various bodies of public opinion outside. Likewise the committee that turned the recommendations of the Conference into a bill was composed of men representing many shades of public opinion. When in the following spring the measure was introduced by Walter Long, Secretary for the Colonies in the Lloyd George administration, he carefully stated that it was not a Government measure. It passed the House in December, was returned from the Lords in January, and agreement

[1] "Responsible Govt. under the Constitution," *Atlantic Monthly*, April, 1886.
[2] Henry Loomis Nelson, "Making Laws at Washington," *Century Magazine*, June, 1902.

was reached in February, 1918. It may be said that this novelty was due at least in part to the exigencies of a state of war. Yet perhaps it was also in part due to the growing tendency to give more weight to workmanship and less to partisanship. Possibly the day of the expert is dawning.

It is not easy to conjecture what is to be the effect of the situation on individual initiative. The chances are against direct restriction. Some form of censorship was urged upon the Massachusetts Recess Committee of 1914 on Legislative Procedure, but met with no favor. The committee believed censorship would delay the getting down to business of the Legislature, already too long postponed. "It would not seem feasible to delegate that authority to some one not a member of the Legislature, as the duty is plainly more than clerical. On the other hand, any body of men taken from the Legislature for the duty would soon find themselves in hot water, disliked by many, the victims of political scheming and log-rolling." [1] Also the fear was expressed that censorship might be thought to interfere with the right of petition.

The committee indulged in some hopeless moralizing. "One reform which is necessary," it said, "whether the rules or laws be changed little or much, is the cultivating of a sense of personal responsibility in each and every individual member. We do not feel like recommending the Nebraska rule, requiring every member to support all petitions sponsored by him before committees and on the floor. We do believe that members should exercise more judgment in the kind of petitions which they file." The Nebraska rule referred to reads: "Members shall introduce such bills only as they are willing to give their personal endorsement and defend." It would be no rash assumption that the Nebraska rule has been as ineffectual as the Massachusetts advice.

Governor Ammons of Colorado, addressing the Governors' Conference in 1913, recalled that when he was Speaker of the House, he made at the close of the session the suggestion that no individual member should be permitted to introduce a bill; instead the member should offer a resolution that the proper committee should present a bill for a certain general purpose; the object being that there should be but one general bill covering a subject. The experience in Colorado had been that if several bills covering the same subject were referred to a committee, it

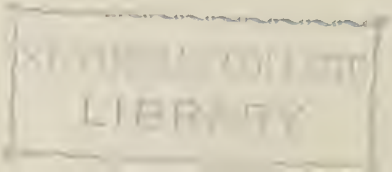
[1] Mass. House Doc. 280, 1915.

does not get up a combined bill or use the one best expressing the object. He gave the Conference to understand that personality was at the bottom of the trouble.[1] Returning to the subject in the Conference of 1914 he held this to be the greatest reform or improvement that could be made in the matter of the introduction of bills. "If we could only eliminate the personality of members in the introduction of these bills the public service would be greatly improved." [2]

If the Governor had in mind the effect of rivalries between members, he might by going to the neighboring State of Nebraska have shown that the evil he deplored was not confined to Colorado. In the Nebraska session of 1913 there were 112 bills introduced in duplicate, and some even in triplicate. However, the fact that nothing like such figures would be found in all the States indicates that the cause is not seated in those influences of ambition or vanity that are common to legislative bodies everywhere. If certain States make a worse showing than others, it may be by reason of difference in political habits or difference in systems of legislative procedure.

Of course in all of them may be found more or less introduction of bills not identical but relating to the same subject. With a decent committee system, that is more likely to be helpful than otherwise; by presenting various points of view and suggesting various methods of remedy. It does not, however, indicate abnormal fecundity of the legislative mind. In point of fact the inventive powers of our legislators have been grossly exaggerated. They are not guilty of anything like the prodigious ingenuity with which they are often charged. Examination of the Illinois legislative product in 1905 disclosed that of 165 matters (outside of appropriation and revenue bills, omitted as notoriously the result of the pull and haul of interests) eighty-three were to be assigned to administrative initiative, thirty-four to special interests, twenty to public opinion in some one or another of its definite forms, and two to political machines acting for their own direct interest, leaving only twenty-six to be assigned to members of the Legislature acting in their theoretical legislative capacity.[3] Inquiry by the Nebraska Legislative Reference Bureau in 1913, though conducted along somewhat different lines, also showed members were responsible for beginning much less than half the

[1] *Proceedings*, 278. [2] *Ibid.*, 219.
[3] Arthur F. Bentley, *The Process of Government*, app. II, p. 492.



work. In the case of 741 of the bills introduced, 288 were presented as a result of the member's own individual initiative and study of the subject; 234 at the request of constituents; 107 at the request of some resident of the State not a constituent of the member; 74 at the request of some society, association, or other organization in the State; and 38 at the instance and request of other individuals or organizations. Furthermore let it be understood that such computations are deceptive in their indication of the share taken by legislators in the conceiving of laws. Their part in the work would have been seen to shrink materially had the bills been weighted for relative importance.

Granting, however, that there are certain evils in the unrestricted initiative of legislators, it does not follow that the remedy advised by Governor Ammons is desirable. Indeed experience in Massachusetts proved it to be distinctly unwise. There a joint special committee appointed in 1892 to consider among other things what steps should be taken to shorten the sessions and expedite business, reporting in 1893 (House No. 5), found that the bulk of the work in the Legislature had grown to be based upon orders of inquiry. The rules said that all motions contemplating legislation, when not founded upon petition, or upon bill proposed to be introduced on leave, should be made in the form of an order of inquiry, which should indicate the nature of the legislation proposed. In practice such orders were adopted as a matter of course, sometimes in the most vague and indefinite form, and sent to a committee. Sometimes the same subject-matter had been under consideration at the same time by several committees. It was recommended that this be stopped, and that the standing committees should have before them at the outset a draft of what was asked. Accordingly the rules were changed to this end, by requirement that every petitioner accompany his prayer with the draft of a bill. The result has been to give in advance to both legislators and public a reasonably adequate idea of what is contemplated. Although it could not be shown that this change has had any appreciable effect in accomplishing the purpose in mind, namely, the shortening of sessions, it did conduce to more systematic handling of business and the present system would not be abandoned.

To lessen the volume of measures, nothing drastic enough to warrant the name of censorship is necessary, at any rate for a start. Many measures could be headed off by a few simple pro-

visions. A committee or commission could in some cases show the petitioner a better course to pursue; could insist on report by an administrative department concerned, which would often end the matter; could recommend against referring to a standing committee proposals so recently passed upon as to make any considerable change in public opinion improbable — the "hardy annuals," as they are called, that are forced on each successive assembly for the sake of propaganda; could prevent the presentation of duplicate bills; could impede the palpably ridiculous proposals. Such an inspecting board need not have absolute authority. It could accomplish its purpose were the rule made that no measure it might report upon adversely should be sent to a committee save by a two-thirds or three-quarters vote. In brief, it might secure, when desirable, the original purpose of leave to introduce, namely, attention to the broad purpose of a proposal before devoting time to its careful and detailed consideration.

It will be seen that this idea simply advances the work of the sifting or steering committee now found in various Legislatures. At present selection is postponed till toward the end of the session. Why not exercise some judgment at the start? Were the scrutiny then made, it would not be impossible to devise a reasonable way of giving preference to the measures recognized as of real importance. The others need not be buried summarily. Let them have a chance if time permits. Would that not be more sensible than the method of handling bills of private members in Parliament, where position is secured by lot? Would it not be more defensible than the Georgia rule under which the introduction of bills is in order on but three days in the week and a member can present only one bill of a general nature each day? Would it not be more sagacious than the Illinois refusal to let a member introduce more than three bills at any one call of the roll for that purpose? Surely such illogical devices for trying to stem the flood of bills cannot long survive. Reasonable men will some day see that reason ought to be exercised in this as in all the other exigencies developed by new conditions.

Meanwhile such an artificial restraint as that in Illinois is sure to be ineffective. Its lack of reason develops evasion by the granting of unanimous consent for the suspension of the rule. Custom quickly makes this an invariable practice and the rule becomes that nuisance, a dead letter.

Somebody who believes the introduction of bills is too easy and too irresponsible, and who thinks the flood ought to be controlled at the source, has suggested that if the endorsement of ten or fifteen per cent of the membership of a legislative body were required for the introduction of a bill, an endorsement indicated by formal signature, not only to the bill, but to a statement that the signer favors the bill, the volume would be decidedly checked. This would be an interference with the right of petition that at any rate in Massachusetts would not be tolerated. Also it would be unfortunate in suppressing the solitary reformer who must begin every crusade. To demand that before he present his proposal he win a goodly number of converts by individual appeal might quench enthusiasm and stifle progress most lamentably. It is safer to give him his chance before a committee.

In my own judgment the most promising of simple reliefs is the imposing of a nominal fee for the introduction of a bill, a fee no larger than that for beginning a suit in one of the lower courts. Why draw a line between the man who thinks himself wronged by his neighbor and the man who thinks himself wronged by the State? If fees for one, why not fees for the other? Justice is a public, not a private, concern. Whenever and wherever invoked, she may ask a reasonable guarantee of seriousness and good faith. Nothing more is justifiable, but that much is prudent and fair.

A minor source of trouble in some Legislatures is the incitement given to the careless introduction of bills, by the practice of permitting their withdrawal. In Iowa, for example, in 1915 about sixty-five bills were thus withdrawn. To one familiar only with procedure not permitting such a practice, it suggests no good and some harm. Are not lawmakers likely to be more careful about what they father if a vote is certain? Are not "strike bills" encouraged if a member may withdraw a measure easily? And may not improper pressure be applied with less difficulty? Once a question has been thrown into the arena, is it not best to secure it an answer? In theory, at any rate, measures are not submitted for the individual good of a member, but for the common good, and the common voice ought to be heard in reply.

Preliminary study of form is of course quite another matter from preliminary study of substance. Here there is room for great gain through bringing into play the capacities of the expert. Those among us who hope for this find encouragement in

every State Legislature and even in Congress. Of late years there has been significant increase in the amount of bill-preparation by commissions of all sorts — public utility, railroad, health, insurance, and all the rest. Under President Taft the Departments at Washington framed needed legislation more than ever before. The men who best know what ought to be done are getting the courage to tell it and to show how. At the same time the Chief Executives of the land are beginning to accompany their recommendations with carefully prepared drafts of bills. Also the Legislatures themselves are awaking to the need, and creating recess committees or special commissions that give definite shape to the conclusions they reach, submitting the precise form they think legislation should take.

In line with this is the growing belief that even though there should be no accompanying study of substance, yet the technique of any proposal should be either prepared or approved by experts. Thus a rule of the Vermont House reads: "All bills intended for presentation by any member of the House shall be first presented to the Legislative Draftsmen, whose duty it shall be, within three days after receiving each bill, to examine and revise the same as to form and expression, so far as it may require." Some other Legislatures are establishing the same practice. The drawback lies in the waste it involves. Where not one measure in ten is likely to succeed, the time spent in perfecting the form of the other nine measures is thrown away. Furthermore, with the present avalanche of bills at the opening of the session, it is utterly impossible to polish each of them adequately. Here is still another reason for urging as a basic remedy the exclusion of the administrative measures that make up the bulk of present-day legislation, or at any rate their preliminary consideration by agencies quite outside the legislative body itself.

Time Limits

Experience has shown that if new business may be brought in at any time in the course of a session, much of it will be held till toward the close, either through that tendency to procrastinate which is common to all mankind or else with the sinister purpose of getting improper legislation in the crush of work at the end. Here observe one more proof, in addition to the many proofs already given, that the centuries have not changed human nature. At a Massachusetts General Court June 14, 1642, it was ordered

"that after the end of this Court no petition shalbe received in any Generall Court, after the end of the third day of the sitting of the Court." [1] This was repealed November 4, 1646,[2] but evidently procrastination continued to make trouble, for in 1654 the House of Deputies voted no petitions should be received after the first four days of the Court of Elections, nor after the first week of any other session.[3] In provincial New Jersey the number of private acts, such as those for naturalization, and acts relative to private meadows and marshes, so increased with the growth of the province that it became absolutely necessary to restrict the petitions for private matters in some way, and in 1772 a resolution was passed that petitions for private bills would be received only within the first ten days of the session.[4]

Up to the middle of the nineteenth century the States did not go beyond legislative rules in attempts to meet the situation. Then in 1850 the new Constitution of Michigan said: "No new bill shall be introduced into either House during the last three days of the session, without the unanimous consent of the House in which it originates." In 1860 this was changed by amendment to read: "No new bill shall be introduced into either House of the Legislature after the first fifty days of a session shall have expired." In the Constitution recommended to the people and rejected in 1873, the clause was added, "except on recommendation of the Governor." In 1904 the whole section was repealed by a vote of 180,157 to 98,657. The trouble with it came from the practice of introducing "skeleton bills" before the fifty days had expired. The courts had held that the section did not interfere with the right of the Legislature to amend a bill, and that where the general purpose of the bill as introduced had been kept in view and no design to circumvent the Constitution was apparent, an amendment was as much admissible after fifty days as before; also that it was immaterial whether the method pursued was by amendment or substitute, so long as the substitute was for the same purpose as the original bill. Said Justice Morse in speaking for the court in Attorney General *v.* Rice, 64 Mich. 385 (1887): "While the questionable practice of so amending bills, after the expiration of the fifty-day limit, as to make the act passed entirely different from and foreign to the bill introduced,

[1] *Records of the Colony of the Mass. Bay in N.E.*, II, 20.
[2] *Ibid.*, 165. [3] *Ibid.*, III, 343.
[4] E. J. Fisher, *New Jersey as a Royal Province*, Col. Univ. Studies, 41, 80.

— in fact a new bill, — has obtained to a great extent in our legislative practice, it is to be hoped that the introducing of mere titles, without any body, is seldom resorted to. If it can be successfully maintained, the safeguard of the Constitution will be completely broken down, and its provisions nullified." Although it was held that when the Journal plainly showed the original bill was "borrowed" for purposes of substitution and that the substitute was for a radically different purpose, the presumption to the contrary was overthrown, yet the practical effect of the presumption was to make the worth of the provision insignificant.

Maryland in 1851 imitated Michigan, save that it permitted suspension of the rule by a three-fourths vote. In 1867 the forbidden time was extended to ten days, and though the vote for suspension was changed to two thirds it was required to be taken by Yeas and Nays. Arkansas in 1868 forbade introduction in the last three days save by unanimous consent, and struck out the unanimous consent in 1874. Of the States that came into the Union in 1889, Washington made the limit ten days except by a two-thirds Yea-and-Nay vote of all elected; Wyoming restricted the provision to bills for appropriating money, making the time five days unless by unanimous consent; and Montana likewise, except that the time was to be ten days. Mississippi in 1890 forbade the introduction of any bills during the last three days. Oklahoma in 1910 made it "after the tenth day prior to the expiration of the session," and confined it to bills appropriating money (except for current expenses), or for the increase of compensation of any officer, or for the creation of any lucrative office, but permitted the rule to be waived by unanimous consent. New Mexico said the same thing.

Some of the States have preferred to reckon from the other end. Colorado in 1876 counted from the start, drawing the line after the first twenty-five days. This was changed to thirty in 1884 when the session was lengthened to ninety days, and again changed, in 1918, to fifteen. Nebraska in 1886 drew the line at the fortieth day of a sixty-day session, except for matters brought to attention by a special message from the Governor, changing it in 1913 to the twentieth day, except for general appropriation bills. North Dakota in 1889 also made it the fortieth day.

California in 1879 set the limit at the fiftieth day of a session virtually restricted to sixty days by the requirement that mem-

bers should not be paid for a longer time. The limit could be waived by a vote of two thirds of the members. In 1898 the voters rejected at the polls an amendment extending the limit of the session to seventy-five days, limiting the introduction of bills to the first twenty-five days (except by three-fourths vote), and providing for a recess of from thirty to sixty days, to be taken at the end of the first twenty-five days of the session. In 1911 the recess idea met better fortune. Provision was made for a recess after not more than thirty days, the recess to be not less than thirty. "On the re-assembling of the Legislature, no bill shall be introduced in either House without the consent of three-fourths of the members thereof, nor shall more than two bills be introduced by any one member after such re-assembling." It was proposed in the Michigan Convention of 1907–08 that the Legislature should sit for ten days in January, for the introduction of bills, and then should recess. The idea, however, did not win acceptance. In Massachusetts it was more fortunate, an amendment adopted in 1918 providing for a recess or recesses of not more than thirty days in the first sixty. As yet the Legislature has not taken advantage of the opportunity this gives to systematize the handling of business.

Minnesota by amendment in 1888, when limiting sessions to ninety days, provided that no new bill should be introduced in the last twenty days except on written request of the Governor or upon his calling attention by special message to some important matter of general interest. The Judiciary Committee of the House of 1889 was of the unanimous opinion, so reporting, that the limitation of twenty days applied only to ninety-day sessions — proportionately for a shorter session. The House by rule has made introduction between the sixtieth and seventieth day, contingent on a two-thirds vote. Lynn Haines in his book on "The Minnesota Legislature of 1909" says that the Governor rarely withholds the required permission for the introduction of bills in the twenty days before final adjournment. Haines urged that no bill should be introduced after the first fifteen days of the session, except in the case of emergency or natural calamity. In his book on the Legislature of 1911 he changed this to thirty days, but added that it should be secured by constitutional amendment. Chief Clerk Oscar Arneson is quoted by Professor Jones as likewise saying that in Minnesota executive permission has been easy to secure and therefore the provision has had little

effect.[1] Reports from clerks in eleven other States showed a general laxity in this matter that robbed the printed rules of almost all significance.

That is not the case with Massachusetts. The rules are well observed. No resort to constitutional reënforcement has been found necessary. Johnson Gardner told the Convention of 1853 that if it would secure the adoption of a requirement for all petitions to be presented within sixty days from the opening of the session, the length of the session would be shortened by a third, but the Convention with excellent judgment left the matter to the Legislature itself. Step by step the time for bringing in new business was lessened until by 1914 the second Saturday of the session had been reached as the limit. This gave only ten days after assembling, but even that seemed too much to the Massachusetts Bar Association Committee on Legislation. It pointed out that many of the bills were not printed until February, and went on to say: "In the laudable desire to shorten the session, hearings begin before all the bills are printed. The result is that it is very difficult to get the bills on various subjects together for careful study and criticism before the hearings on many of them are held, and everything is as inconveniently and unnecessarily congested at the beginning of every session as it can possibly be. No well-managed business would tolerate such a condition of affairs, and there seems no sound reason why the clerical detail of the Legislature should not be put on a convenient and business-like basis. Certainly there is nothing sacred about the traditional parliamentary habit of having bills and petitions formally introduced by members before they are printed. If all bills on individual petitions were required to be filed by December 10th and printed by January 1st they could be formally introduced just as well after the Legislature met."

The argument appealed to the Special Committee on Legislative Procedure. In its report to the Legislature of 1915 it further disclosed the bad effects of the situation. "Those who are familiar with our legislative sessions in recent years," it said, "realize the congestion at the opening of the session. The Clerks of the two branches and their assistants work until late at night for at least two or three weeks. The printing office is congested. Committees cannot start to hold hearings because the bills have not reached them or have not been printed. Oftentimes when some

[1] *Proceedings*, Am. Pol. Sc. Assn., December, 1913–January, 1914, 197.

committees have started hearings on some matters they have found subsequent bills of the same import, and the ground has to be covered all over again; hence most committees wait until they receive all matters before assigning hearings, as they find that time is saved in the end by grouping and classifying hearings. The first three or four weeks of the session is generally taken up with the reading of the titles of petitions by the Clerk in each branch, and the announcement by the presiding officer of the name of the committee to which they are referred. Not more than 200 a day can be readily handled in this manner, including the necessary clerical tabulation and book and Journal records. The Legislature, therefore, marks time for about a month, and does n't get into its stride much before the middle of February, and all because of the avalanche of bills poured into the legislative hopper between the opening day and the second Saturday of the session." Accordingly the committee recommended a change in the rules so that all petitions should be filed on or before the third Wednesday preceding the convening of the General Court. The change has not yet been made. Massachusetts often takes a distressingly long while to mull over evident necessities, but perhaps for that reason her solutions of problems, sure to come in the course of time, are all the wiser.

The efficacy of rules in such matters depends on the prevailing standards of respect for law. In the Massachusetts General Court, to contemplate breaking or even evading the rule, is not a normal mental process. The spirit is that of the sportsman who means to play the game fairly and knows that unless rules are observed, fair play is impossible. The presiding officers know that their chance for political advancement will be bigger if they achieve records for short sessions, and they stiffen up their Committees on Rules to the point of making it hard for anybody to get a report advising the admission of anything after the time limit. Every tardy petitioner is asked, with sternness enough to make him dislike to go through the experience again, "Why did you not present this in time?" and, "Why cannot this wait till next year?" A routine matter not likely to stir up contention on the floor usually gets by the committee, but the requirement of a four-fifths vote for suspending the rule and the certainty that the committee will fight any attempt to upset its adverse report, with a very strong likelihood of getting the one fifth of the votes necessary, brings about reasonably thorough compliance with the

purpose of the rule. The result is that in Massachusetts there is nothing whatever like the congestion of business found at the end of the session in most of the other Legislatures of the land.

The remedy is far more efficacious than the abnormal and absurd device of arbitrarily limiting the length of sessions. Take, for instance, the situation in Virginia, which in 1902 limited the session to sixty days, with a provision for extension to ninety days by concurrence of three fifths of all members elected, but the further stipulation that no member should be paid for more than sixty days. Governor Mann of that State, who had been a member of the Senate for ten years, told the Governors' Conference of 1913 he found that whether they had ninety days or four months for the discharge of their duty, bills were passed in the last ten days of the session just as they are now, and he believed if the session were extended to six months, the practice would probably be the same. He thought the difficulty confronting most of the States would be met by providing that all bills should be introduced in the first half of a sixty-day session.[1]

The experience of States working along this line toward reform does not justify such an expectation. Put all your business before the Legislature at the opening of the session, teach its members that both personal convenience and the public welfare call for observance of the rules, take off your time limit for adjournment, and your Legislatures will begin to win back the confidence and respect of the community.

[1] *Proceedings*, 317, 318.

CHAPTER IV

COMMITTEES

In the making of a law two things are to be done: the principle or purpose is to be agreed upon; and the way of accomplishing it is to be determined. In the natural course that would be the order of proceeding, and such it was in the early years of Parliament. After deciding to consider a proposal, the House discussed its general purport, and if approval followed, then studied details. The need of entrusting some of the work to part of the members was early felt. Under Edward I began the practice of appointing at the beginning of the session two groups of triers of petitions, whose duty it was to decide which petitions ought to go to the King, which to Parliament, and which to the law courts. In the case of those that Parliament kept for its own attention and that it decided to grant, as early as 1340 the custom began of selecting committees to draft the necessary statute. When leave was given to a member to bring in a bill, a committee was named for that purpose, on which the mover and seconder were always appointed, with one or two more. These drafting committees had become a recognized institution when Sir Thomas Smith wrote his book on "The Commonwealth of England," published in Elizabeth's reign.

About this time it seems to have been conceived that the details of the more important measures might well be considered by a numerous group of members. To encourage attendance it was arranged that any one might attend; and all present were "to have voices." Thus it came about that one of these committees was in effect nothing but the House sitting after a different fashion. Certain advantages developed. A committee could choose its own chairman, and when the domineering James reached the throne, this was of importance, for the Speaker was believed to be his minion and a tale-bearer, so that it was well worth while to discuss much of the business without report of it going straight to the royal ear. At first the Speaker withdrew when the House resolved itself into a Committee of the Whole, but when his absence had ceased to be desirable, the practice began of having him take a seat at one side of the Clerk's chair, which was

used by the Chairman, the Clerk himself removing to a stool close by. The Speaker was then presumed to have become for the time being an ordinary member, with the right to speak and vote, but that right has now fallen into disuse in Parliament, Speaker Denison (1857–72) having exercised it last.

Doubtless at the start there was much less formality in Committee than in the House itself, where the rules of procedure hampered freedom of action. In the course of time, with the application of many rules of parliamentary law to Committees, this difference has in part disappeared, but the traditional spirit of informality still pervades a Committee and is fostered by some formulated variations in practice. For instance, members can speak as many times as they please in Committee, which encourages colloquy, a most useful form of debate. This has led to the understanding that speeches in Committee should be brief, to the point, business-like, almost conversational. "The object of Committee debate," says Redlich, "is to arrive at decisions upon special questions of substance and to settle the essential points of detail one by one. The aim of what is said is to *convince*, and not to gain a mere debating advantage. Committee therefore offers to individual members the best scope for display of expert knowledge, untiring industry, capacity for routine work and ready action; many a new member makes his reputation there."[1]

Some of the characteristics of work in Committee have greatly changed in the course of the last half-century. Mr. Asquith told the Select Committee on House of Commons Procedure in 1914 that if they would look at the debates on very important measures, for instance, the Bill for the Disestablishment of the Irish Church something less than fifty years before, they would be surprised to see both how short a time the Committee occupied and how many clauses passed without any discussion or amendment at all, the principle of the measure being accepted on the Second Reading. In modern times, he said, it is the practice of both parties in the Committee stage to propose amendments and carry on discussions the object of which is not to carry out the principle settled on Second Reading, but to make amendments for the purpose of the wreckage of the bill. That is a perfectly legitimate parliamentary weapon, but it is one the use of which is very much more common now than in the old days.

[1] *The Procedure of the House of Commons*, III, 92.

Procedure by Committee of the Whole was familiar to the lawmakers of colonial America, and here too became part of the recognized parliamentary practice. In New York and Georgia nearly all bills were referred to such a committee after the second reading, and it was much used in Virginia and the Carolinas. In New England, however, resort to it was rare, and it was not employed for discussing bills.[1] Virginia devised a novel function for it, that of drawing up a program for a session. The Continental Congress frequently resolved itself into Committee of the Whole to consider the more important business, and also for giving audience to foreign ministers.

When enough delegates to the Federal Convention of 1787 had at last arrived, it was resolved, May 29, "that the House will meet to-morrow to resolve itself into a Committee of the Whole House to consider the state of the American Union." Virginians were leaders in that Convention, and we may presume were responsible for this wording of the motion. It had been the custom in Virginia to use two forms — the "Committee of the Whole House," to which were referred bills after second reading, and the "Committee of the Whole House on the State of the Commonwealth," which discussed the Governor's letter and outlined the legislative business. The distinction was based wholly on the nature of the business, being simply a device for classification. It was engrafted on the practice of Congress, and to-day, with the omission of the word "American," the formula used in the Convention is used in both branches at Washington.

After the Senate of the newly created Union had passed only one bill, in May of 1789, it gave to the Committee of the Whole exceptional scope, for it resolved "that all bills on second reading shall be considered by the Senate in the same manner as if the Senate were in Committee of the Whole, before they shall be taken up and proceeded on by the Senate agreeable to the standing rules, unless otherwise ordered." Under this the practice in Committee differs little from that when the Senate is not in Committee. The Yeas and Nays may be demanded and entered in the Journal; a motion to adjourn, or take a recess, or postpone, or commit may be made; — in brief, the Committee may do almost anything the Senate may do.

In the House of Representatives all bills to raise revenue, or which make a charge upon the treasury, must be considered in

[1] R. V. Harlow, *Legislative Methods in the Period Before 1825*, 93.

Committee of the Whole. Since much the greater part of the work involves expenditure, the House is in Committee the greater part of the time. From the point of view of efficiency, here the House may be seen at its worst and at its best. After the opening speech explaining the bill, which is really useful, the many hours devoted to general debate — that is, debate not confined to the bill — drive most of the members to their offices. Perfervid orators hurl at empty seats the periods that later put in pamphlet form will persuade constituents to reëlect. Dreary bores drone away from manuscript. Occasionally an able man with a message worth while accepts the opportunity for want of a better, and perhaps a friend by doubting the presence of a quorum will set the call bells ringing and get him an audience. For the most part, though, "general debate" is sheer waste of time and a pitiful reflection on the capacity of our greatest representative assemblage to use intelligently and efficiently its precious hours.

When at last the orators have used all the time that the leaders had agreed to throw away in this fashion, then comes the best work done in Congress. The bill is read section by section, with opportunity for debate and amendment at the end of each. Speeches are limited to five minutes, but if it is evident that a man really has something to say, he can easily get two, three, or five minutes more by unanimous consent. The curious practice of *pro forma* amendment is constantly used. Somebody moves to strike out the last word and talks five minutes on a real issue. Then somebody else pretends opposition to this *pro forma* amendment. The rule forbidding more than two speeches is then escaped by moving another *pro forma* amendment, to strike out the last two words, and so on. The Chairman permits much latitude in all this, with the result that there is a cross-fire of short, sharp speeches to the point, and intelligent decision is usually reached with reasonable celerity. There being no record votes in Committee, it is exceptional for men to share in this decision without having heard the arguments, as often happens when the Yeas and Nays can be demanded. Also the absence of the roll-call conduces to judgment disinterested, without an eye to the effect on party standing or the chances of reëlection. Furthermore, it saves time.

Most of the work in Committee is usually done with a small attendance. Before 1890 the quorum was the same as in the House,

a majority, but since then, except in two Congresses, it has been 100. Often that number will not be on hand, but it is for the most part recognized that this kind of work is best done when only a few score of members are present. They include those having some acquaintance with the topic, the watch-dogs who are always on the alert to guard the public treasury, and enough others to make a satisfactory jury. A large attendance would produce more talk and poorer verdicts.

The Senate practice of requiring every measure to be considered in Committee of the Whole has been imitated in a few of the State Legislatures, and likewise the House practice of requiring such consideration in the case of appropriation bills. It is idle to particularize because custom so often nullifies the rules that no stranger can safely undertake to say just what takes place. For instance, it would be inferred from reading the Pennsylvania rules that there the Committee of the Whole is used invariably. The fact is, however, that the Speaker's formula, "Will the House dispense with the Committee of the Whole — Dispensed with," has become a matter of routine.[1] For the most part the rules permit rather than command, or leave the matter to the general principles of parliamentary law. In general it may be said that most of the Legislatures have allowed the use of the Committee of the Whole to lapse. The change in Iowa is typical; in its Territorial Legislature all bills had to be considered in Committee of the Whole; its latest session did not see the committee used once. The Massachusetts General Court resorts to it hardly once in a decade, and then without advantage, mainly because nobody knows how to extract its benefits.

That it has benefits may be soundly argued, in spite of the general tendency to abandon them. They are of slight consequence for the mass of bills, short, simple, containing but one or two propositions. With complicated measures of many sections, full of details, the case is quite different. For the proper handling of these, ordinary legislative procedure is grossly inadequate. It usually compels voting on what may be from ten to a hundred propositions, at the end of perhaps several days of debate, when the arguments on most of the points are no longer fresh in mind, indeed may not have been heard at all by many who vote. The conditions are hostile to independent judgment. The impulse is to vote "Yes" every time, or "No" every time. Everything

[1] Samuel Bryan Scott, *State Government in Pennsylvania*, 26.

predisposes toward poor work. Against this there is but one safeguard, and that is to act upon the propositions that make up a compendious or complicated bill, one at a time. As far as that rather clumsy and stupid fiction, the Committee of the Whole, secures this, it serves a most desirable purpose, for which it should be preserved and utilized until legislative bodies are willing to secure the end by simpler ways.

That is wholly feasible. The Rhode Island House accomplishes most of what is necessary by its excellent rule that "any bill of more than one section shall be passed upon by sections, at the request of any member." To this might well be added that in debate, section by section, speeches should be limited to five minutes, with the previous question permissible on each section or amendment, but with assurance of say five or ten minutes on each proposal to the member of the committee in charge, as well as a like time to the minority of the committee if any, and the mover of an amendment.

It was after this general plan that the Massachusetts Convention of 1917 conducted a debate of several weeks on the Initiative and Referendum. First there were set speeches, about sixty, on the general principle. A mistake was made, as it afterward seemed, in dealing with these by going into Committee of the Whole. Since it was agreed by both sides that there should be no limit on the number or length of these speeches, they dragged out to tiresome and useless length, and this led many delegates to put the blame unjustly on the Committee of the Whole, which in fact shared in the responsibility for the waste of time only because it precluded impatient members from trying by the previous question to upset the agreement that had been made by the leaders on the two sides of the matter. After the leaders themselves saw the limits of endurance approaching and agreed to bring the set speeches to an end, treatment of the hundred or so of amendments offered went on in satisfactory and efficacious manner. Each amendment could get half an hour of debate if it was wanted, with brief speeches, and then a chance for each side to sum up. The result was general agreement that every detail of the exceedingly complicated measure received fair and adequate consideration.

As a matter of fact, everything that proved of real consequence in the procedure could have been secured without resort to the Committee of the Whole, but it might not have been secured.

On the other hand, gentlemen who thought that the resurrection of the Committee of the Whole (for Massachusetts had buried it) was responsible for delay and waste of time, were quite in error. Barring the few seconds used each day in going into and coming out of Committee, there was no more waste than would have occurred with equally useful procedure in the Convention itself. There was, indeed, much saving of time in one important particular, for undoubtedly there would have been many more roll-calls if the Convention had not been in Committee. Toward the last of the debate, it dispensed with the Committee, and then roll-calls abounded — on the whole, in my judgment, to little advantage.

It is not impossible that the Committee of the Whole may yet win favor by one use thus far exceptional, that of getting information or hearing argument from outside. In 1915 when the Illinois Senate had under consideration a bill to abolish capital punishment, the Governor and others appeared, addressed the Senate, and were in turn questioned by members. We are told that Wisconsin is taking more and more advantage of this possibility by summoning administrative officials to appear before a Committee of the Whole.[1]

Beginnings of Small Committees

When Parliament developed importantly the Committee of the Whole, it had made some trial of small committees, not only those created from time to time for temporary and specific purposes, but also those of some permanence for handling classes of matters. At the beginning of the third Parliament of Queen Elizabeth, in 1571, a group of election cases was referred to a single committee, and with this began the practice of so referring groups of kindred bills. The next step, following quickly, was to refer likewise everything relating to a subject, as took place in the matter of certain "griefs and petitions" concerning ecclesiastical affairs. Before the reign was over, this matured into the modern type of small standing committees by the appointment of committees on elections and privileges.

England was not to see the full development of this type. It flourished there for but a few generations, and then waned under the deadening influence of the growing Cabinet system. Meantime, however, it had taken root in America, where it was des-

[1] H. W. Dodds, *Procedure in State Legislatures*, 70.

tined to expand into the most important of legislative institutions.

When assemblies began on this side of the water, what we now here think of as committees had not taken a part in the proceedings of Parliament important enough to warrant confidence in the supposition that there was here deliberate copying or borrowing. The chances are stronger that as in other respects, so in this, the colonists continued the practices of trading companies. In the conduct of these the use of committees was common. Virginia was the outpost of a trading company, and nothing else, when the first representative assembly in America met, at James City, July 30, 1619. Its first business was the consideration of "the greate Charter, or commission of priviledges, orders and lawes, sent by Sir George Yeardley out of Englande." Doubtless it was with corporation practice in mind that "for the more ease of the Committies, having divided into fower books, he read the former two the same forenoon for expeditious sake, a second time over and so they were referred to the perusall of twoe Comitties, which did reciprocally consider of either, and accordingly brought in their opinions." Later the other two books were likewise referred to the two committees.

Massachusetts also invoked the help of committees. On the 12th of March, 1637/8, the General Court ordered that "at every Generall Court (the Court being called) there shalbee a committe first chosen out to hear & determine of all particular petitions & suites, & of other private business, unless the committee so chosen shall see it meete to bring the cause to the whole Courte."[1] Six years later the practice of working through committees had become well established, judging by the records of the General Court that met May 30, 1644. On the first day the Speaker and two other members were chosen a committee to consider one half of the petitions, and "to make returne of their thaughts & conclusions of them indorsed uppon ye said peticions." Two days later six other members were chosen to do likewise with the other half. Then on the 4th of June it was ordered that "ye next sixt day in ye afternoone bee sett aparte for ye severall committees of ye howse to consider of & ripen the several businesses thereof committed to them." The House had appointed eight committees so far at this session, but they may not all have been confined to its membership and referred to in

[1] *Records of the Colony of the Mass. Bay in N.E.*, I, 223.

this order, for the practice had begun of naming what were really executive committees, chosen irrespective of membership in the General Court, and the greater part of the many committees spoken of in the records for many years were of that nature.

After 1654 or thereabouts committees appeared in Rhode Island, but there too they became executive in their scope. Indeed nowhere in New England did the idea of a committee as a purely legislative organ, with life lasting through the session, get firmly established enough to be called an institution before the Revolutionary War. For the origin of such an institution we must look to the middle and southern colonies. Virginia led. By 1680, its House of Burgesses had standing committees on Privileges and Elections, Propositions and Grievances, and Public Claims. The first two may have been suggested by the custom in Parliament. It is believed that the third, the Committee on Public Claims, was of distinctly colonial origin. It started as a joint committee, acting as the highest court of appeals in the colony. After its judicial work had been taken away, in 1680, it lived on as a House committee, to investigate claims laid before the Legislature.[1] By the time of the Revolution there had been added committees on Courts of Justice, Trade, and Religion.

William Penn's Charter of Liberties to Pennsylvania in 1782 provided: "13. *That* — For the better management of the powers and Trust aforesaid the Provincial Council shall from time to time divide itself into ffour Distinct and proper Committees for the more Easie Administration of the Affairs of the province which divides the Seventy Two into ffour Eighteens. . . . Each of which shall have a distinct portion of business as followeth: a committee of plantatons to situate and settle cities ports and Market-towns and highways and to hear and decide all Suits and Controversies relating to Plantatons. A Committee of Justice and Safety to secure the peace of the province and punish the Male [mal-] Administration of those who subvert Justice to the prejudice of the publick and private Interest. A Committee of Trade and Treasury who Shall Regulate all Trade and Commerce according to Laws encourage Manufacture and Country-growth and defray the publick Charge of the province. And a Committee of manners Education and Arts that all Wicked and scandalous Living may be prevented and that Youth may be successsively trained up in Virtue and useful Knowlledge and Arts."

[1] R. V. Harlow, *Legislative Methods in the Period Before 1825*, ii.

If this program was carried out at all, it was for but a short time. Something simpler, more like the Virginia system, came to be preferred, and we find among the rules adopted for the Assembly in 1703: "After the Meeting of an Assembly, the Regularity of Elections being first inspected, Committees shall be appointed on the several Occasions of their Sessions, so far as they have Knowledge thereof, wherein the Command of the Crown shall be preferred, and next that of the Governor: after which, inspection shall be made into the Law for Safety of the Government, and Preservation of Liberty and Property; next of Grievances; of publick and private Bills; of Petitions, &c. in Course."

The best instance of deliberate adoption of the committee system of Parliament is to be found in the Assembly of New York. At the beginning of a new Assembly, just as at the opening of a new Parliament, days were regularly set apart for the meeting of "Grand Committees" for grievances, courts of justice, and trade. Then a standing committee of Privileges and Elections would be appointed, in accordance with English precedent. "The Legislature of New York," says Harlow, "may have considered itself so pious that no grand committee for religion was needed, or so far beyond hope that one would be useless; certain it is that none was provided for. The Assembly had some sort of a committee on laws, regularly appointed, but apparently not a standing committee in the strict sense of the word. With these two exceptions parliamentary custom was followed to the very letter."[1]

By the middle of the eighteenth century most of the colonies had a few standing committees. Only in Virginia, however, did their work include that which is now the essence of the American committee system, for only in Virginia did they undertake to frame and amend bills.[2] In all the other colonial assemblies bills were drafted by "select" committees — what nowadays are more commonly called "special" committees. This was the customary way of handling a great deal of the business. Separate committees were chosen to answer the Governor's Speech, to audit accounts, to report on the renewal of temporary laws, to investigate specified subjects and make report — in brief to do anything that could more conveniently be done by a few mem-

[1] R. V. Harlow, *Legislative Methods in the Period Before 1825*, 7.
[2] *Ibid.*, 16.

bers than by the whole House. This system, however, did not preclude the House itself from handling such matters as it saw fit. We are told, for instance, that in New Jersey, although special committees were regularly employed for the more minute study of all important bills and measures, yet really vital measures, like those for the support of the Government, were generally elaborated in Committee of the Whole.[1]

The defects of this system apparently began to be recognized before the Revolution, and the practice of working by standing committees began to gain favor. The Massachusetts House in 1760 appointed a standing committee to deal with petitions of sick and wounded soldiers. In 1762 seven different standing committees were appointed, each of which was expected to handle petitions relating to a certain definite subject. These committees, Harlow says, were brought into existence, not for the purpose of imitating parliamentary precedent, but to enable the House to transact its business more expeditiously, and their names bear evidence to their local origin.[2] Four were appointed to consider petitions of sick and wounded soldiers, of those captured in the war, of men who had lost their guns, and of those who for some reason had failed to get their wages; the other three were to deal with petitions regarding the sale of lands, rehearings of lawsuits, and requests for pensions. It would seem as if this was viewed as experimental, and as if the experiment was unsatisfactory, for in the following year the committee on petitions of soldiers who were deprived of their wages was not reappointed, and in 1763 two more of the committees were dropped. From 1765 to 1767 none at all were appointed, and from 1767 to 1774 there was only one, on petitions regarding the sale of land. Before the war was over, the experiment was revived, three committees being appointed in 1777 and more later, but still the lovers of old ways fought the innovation, and in 1785 the House adopted a recommendation that none at all be chosen for that term. Then opinion shifted again; in 1788 there were eight, the convenience of referring all petitions on any subject to the same group of members carried conviction, and by the end of the century the standing committee system was firmly established, at least in Massachusetts.

The general practice throughout the country, however, was

[1] E. P. Tanner, *The Province of New Jersey*, Col. Univ. Studies, xxx, 340.
[2] *Legislative Methods in the Period Before 1825*, 19.

still to use select (or special) committees. This was the rule in Congress, and not until Congress set the example of change did most of the Legislatures follow. Through the first third of the nineteenth century the development went on apace in both National and State capitols. For example, in 1800 there were but seven standing committees in the New York Assembly and their duty in the case of any worthy petition was to report that a select committee be appointed to bring in a bill. By 1830 their number had increased to twenty-nine and they had been granted the right to present measures based on petitions. Not until 1813 were standing committees recognized in Pennsylvania as a State, a general resolution then empowering their appointment by the Speaker, and it was not until 1827 that they were made a regular institution by the rules. At first their power to report by bill had to be authorized by a specific resolution, but in 1825 it had become the custom to grant this authorization under blanket resolution, and by 1830 their right to report by bill was embodied in the rules. Repeating the experience of New York, reference to a committee upon introduction became the regular procedure when individual members began to present measures freely from the floor.[1]

Development in Congress

The Continental Congress came near adopting the standing-committee idea, because the Congress had to execute as well as legislate, neither having nor desiring any executive department to carry out its will. For example, Benjamin Franklin was in May of 1775 made chairman of the committee created on his motion, for "establishing post for conveying letters and intelligence through the continent," thus becoming, in fact, our first Postmaster-General. In that same month George Washington was made chairman of a committee to consider ways and means to supply these colonies with ammunition and military stores, thus becoming our first Chairman of Ways and Means; and in the following month he was made Chairman of our first Committee on Military Affairs.

After the Union had been formed and Congressmen no longer had executive duties, the sway of the select-committee idea became almost complete. The First Congress under the Constitution began with but two committees — a joint Committee on

[1] H. W. Dodds, *Procedure in State Legislatures*, 36, 37.

Enrolled Bills, and a House Committee on Elections. Because the latter was specially authorized from session to session until declared a standing committee in 1794, it has been called a select committee. The second standing committee of the House, also authorized in 1794, was the Committee on Claims. The next Congress added two more — on Commerce and Manufactures, and on Revisal and Unfinished Business.

Nearly all the committee work of the early Congresses was done by select committees or in Committee of the Whole. Fisher Ames gave a graphic account of some imperfections of the system. Writing to George Richards Minot, July 8, 1789, he said: "The bill was at first very imperfect. We labored on it for some time, settled some principles, and referred it to a large and very good committee. They met, agreed upon principles, and the clerk drew the bill which they reported. We consider it in Committee of the Whole, and we indulge a very minute criticism upon its style. We correct spelling, or erase *may* and insert *shall*, and quiddle in a manner which provokes me. A select committee would soon correct little improprieties. Our great committee is too unwieldy for this operation. [The first House had but sixty-five members.] A great clumsy machine is applied to the slightest and most delicate operations — the hoof of the elephant to the strokes of mezzotinto. I dislike the Committee of the Whole more than ever." [1]

The fault was found, it will be seen, because the Committee of the Whole did what would now be done by a revising committee, and not by reason of defects in the select-committee system. Indeed, select committees became a more and more frequent resort. There were at least 350 of them in the Third Congress. This meant the time and trouble of naming a committee for even the pettiest items of business. Such a system could not last. Gradually the number of standing committees grew and the number of select committees dwindled. By the time of the three war sessions of the Congress of 1813–15, the total of select committees had shrunk to seventy, and twenty years later this had been cut in halves. Nowadays a Congress rarely sees more than a dozen. Meantime the number of standing committees of the House has increased to about sixty, and of the Senate to more than seventy.

In my judgment this process has been a matter of convenience,

[1] *Works of Fisher Ames*, I, 61.

a natural development of orderly system, not begun with any deliberate purpose, nor developed with any ulterior motive. Herein my view differs from that of men who find in it an attempt to avoid the Cabinet system. Professor Ford,[1] for example, ever ready to see in the facts of history something to buttress his argument that our fathers erred in not following English lines of development and that we ought now to cultivate ministerial responsibility, finds the origin of "the peculiar system of standing committees, which has had such monstrous development," in the cessation by Congress of reliance upon the Administration for the drafting of measures. He uses the *post hoc, propter hoc* argument when he says: "Congress originally pursued parliamentary methods, and did not begin to develop its peculiar characteristics until it had rejected the offices of the chiefs of the administration on which it had originally depended, and threw itself upon its own resources." It is true that some part of Congress resented the domination of Alexander Hamilton, but why imply that in the transition from select to standing committees, this was the cause? The new Government was chiefly controlled by Virginians for a generation, and standing committees had been familiar in Virginia for many years. The Committee on Claims, for example, had been used there for a century. Is it not more reasonable to suppose that the graduates of the House of Burgesses slowly succeeded in persuading their New England associates that the standing committee was a better piece of machinery than the select committee?

Professor Ford further implies when he says: "On December 16, 1796, the party breach between the House and the administration being then complete, it was resolved on motion of Mr. Gallatin that a standing Committee of Ways and Means should be appointed to watch over the national finances. Thereafter, motions to increase the number of standing committees were made at every session." The story as told by Asher C. Hinds hardly tallies with this. "A select Committee on Ways and Means," Hinds says, "was one of the earliest appointed in the House, a resolution having been adopted on July 24, 1789, instituting such a committee, to be composed of a Member from each State, and charged with the question of investigating supplies. Previous to 1800 the committee was spoken of as a stand-

[1] Henry Jones Ford, *Rise and Growth of American Politics*, 225–26; "The Record of the Administration," *Atlantic*, May, 1916.

ing committee; but as a standing committee, as the term is understood now, the Ways and Means dates from January 7, 1802." [1]

Even ten years later the committees of Congress had not become the controlling factors. They were looked upon as merely organs to investigate some fact, and to digest and arrange the details of a complicated subject, so that, as Calhoun said in 1812, "the House may more easily comprehend the whole," the reason for them being that "this body is too large for either of these operations, and, therefore, a reference is had to smaller ones."

It seems clear, then, that in its first twenty years and more, Congress did not clothe its committees with primary responsibilities. They were not originating, planning, recommending, directing groups of members. They had neither received nor usurped the functions of a British Cabinet. The House itself, acting in the guise of Committee of the Whole, was the center of action and responsibility. Custom had not begun to make it necessary that everything should be referred to small committees for examination and report. Bills often went through without being referred at all. If a proposition was referred, whether the subject had been introduced by petition or resolution, by message from the President or communication from the head of a department, the normal course was for the Committee of the Whole to control, not simply to approve or reject. When it had made up its mind, then a committee would be appointed to draw up and bring in a bill according with specific directions.

In the course of or soon after the War of 1812 the situation changed. Of the present standing committees of the House, only nine go back to before that period; in the next decade eight more were created. In the Senate the change came with a rush. Before 1816 the Senate had only three standing committees; in that year twelve were created at one time. Hardin of Kentucky, in January of 1816, greatly regretted to observe in the House "an unconquerable indisposition to alter, change, or modify anything reported by any one of the standing committees." Three weeks later Taul of Kentucky confessed he distrusted his own judgment when it differed from that of any of the standing committees. "The members composing these committees," he said, "are selected for their capacity and particular knowledge of the

[1] *Precedents of the House of Representatives*, IV, par. 4020.

business to be referred to them. Those selections have been judiciously made. The standing committees have a double responsibility on them. Hence it is presumed that every measure, before it is reported to the House, undergoes a very nice scrutiny. Those committees have deservedly great weight in the investigation and decision of such questions as may have come before and been decided on by them."

In essence the revolution was complete. The century since then has seen only the elaboration of the system.

With varying promptness the State Legislatures followed the example of Congress, save in the few instances where they had moved first. Here and there throughout the country the old system of a separate, special (or select) committee for every bill did not disappear for many years. In Iowa, for instance, which was admitted as a State in 1846, that practice prevailed in the early Assemblies.

Glancing back over the record of development, it will be seen that two ideas were competing for favor. One was the idea that a legislative body might best proceed by determining a purpose or policy, then working out the details and putting them into the form of law either by having the assembly sit as a Committee of the Whole, or by having a few members perfect the measure. If it was committed to these few members, the only object was to secure closer scrutiny of details than the full assembly could conveniently give, in order that if any changes were desirable, they could be wisely recommended. This method is still preferred in England for problems affecting the general welfare, those treated by what are known as "public" bills.

The other idea was that a few members should advise the whole both as to purpose or policy, and as to how it would best be accomplished. This idea, after struggling through two centuries for leadership, forged ahead, and half a century later had completely triumphed. It reached the entrenched position of constitutional requirement when in 1873 Pennsylvania put into her new Constitution: "No bill shall be considered unless referred to a committee, returned therefrom, and printed for the use of the members." Alabama, imitating this in 1875, changed the wording so as to require reference to a committee of each House. Texas in the following year was content with requiring only one committee reference, but added that no bill should be passed unless it had been reported from the committee at least three days

before adjournment. Missouri (1875), Colorado (1876), Louisiana (1879), Montana (1889), Wyoming (1889), and Kentucky (1890), followed Pennsylvania in substance. Mississippi (1890) strengthened the requirement by stipulating that the report should be "in writing." Then Alabama, in 1901, stiffened its provision into: "No bill shall become a law until it shall have been referred to a standing committee of each House, acted upon by such committee in session, and returned therefrom, which fact shall affirmatively appear upon the Journal of each House." Notice that the reference is to be to a standing committee. Here was official and formal discard of the special or select committee system. Virginia, however, though in the following year copying the Alabama requirement of reference to a committee of each House, and report therefrom, did not specify "standing" committee; and evidently thought the call for a Journal entry superfluous.

It is interesting to note that the progress of the French Chamber of Deputies in the matter of standing committees has been exactly like ours, though following it by many years. In 1882, against bitter opposition, a standing committee on the army was created. A committee on the tariff, appointed in 1890, aroused less hostility. By 1896 there were sixteen standing committees, and only seventy-one special committees; of 1356 projects submitted to committees, 1219 went to standing committees, only 137 to special committees.

Italy, Belgium, and Holland were, at any rate up to the time of the World War, following with slight modifications and difference in detail the French system as it was worked before the increase of standing committees. The main points of this system may be briefly summarized as follows: first, the immediate reference of a bill to committee without previous discussion in the Chamber; secondly, the detailed examination of the bill in a small special committee elected by the Chamber, which for this purpose is divided afresh every month by lot into Offices or Sections; thirdly, the discussion of the bill in the Chamber after report from the committee, in a single stage or deliberation, divided into two "phases," (*a*) a general discussion of the principles (called the "general discussion"), and (*b*) a detailed discussion of the clauses or articles and amendments (called "the special discussion"), followed immediately by a final vote on the whole bill.

The Swedish Riksdag has six permanent joint committees, with an equal number of members from each Chamber. For matters not coming normally under their jurisdiction, temporary committees are appointed.

CHAPTER V

COMMITTEE SELECTION

NOWADAYS when any group of men is transacting business with some regard to parliamentary forms, but without such rules as are found in legislative bodies, if a motion for a committee prevails, the chances are that the chairman will ask, "How shall the committee be appointed?" Thereupon somebody may answer: "From the floor." Here is a survival of a very ancient practice. For many, many years in Parliament and in most of the American legislating bodies it was the custom for members, each as he could get the chance, to call out the names of those they wanted on committees. More than three centuries ago D'Ewes told how it was done in Parliament: "The Speaker did put the House in mind, to name committees. And thereupon every one of the House that listed, did name such other Members of the same, to be of the Committee, as they thought, fit; and the Clerk either did, or ought to have written down as many of them, as he conveniently could; and when a convenient number of the Committees named, were set down by the Clerk, then did the Speaker move the House to name the time and place, when and where they should meet."

Remember that these were "select" committees. The name, indeed, may have been given in order to discriminate between "select" and "elect." The account of D'Ewes does not indicate that the House voted on their membership at all, but the first clear description of the method of choice in Massachusetts indicates an element of election. The entry in the Journal of the House of Deputies for June 4, 1644, reads: "It is voted & ordred, to bee att ye libertie of each member of this howse (uppon ye choyce of committees for ye ripeninge of businesses) to nominate whome they please for ye said committees, & after such libertie improved, the Speaker (for ye time beeinge) shall put to vote, in order, all such as are soe nominated, & that nomber of persons as shalbee agreed uppon, (to bee of ye committee,) that shall have most voyces, shalbee accompted as men chosen by ye howse." [1]

Just when the Speaker began to share in the nominating it

[1] *Records of the Colony of the Mass. Bay in N.E.*, III, 4.

would be impossible to determine. A member himself, there was no reason why he should not exercise the privilege as well as any other member, and the prestige of his office would naturally give him the right of way. Evidently that had been recognized long before 1682, for we find the Journal of the Virginia House of Burgesses recording in that year, April 22: "The question whether according to the usuall Custome the speaker of the house have the first nomination of the members of the house for a Committee and the house to allow or disapprove of the same, or whether the first nomination of the Committee be by the house, Resolved that the first nomination of the members for a Committee be (as heretofore hath bin) first by the speaker to be allowed or disallowed as they please." [1] One of the rules adopted for the Pennsylvania Assembly in 1703 read: "That the Speaker have Power to nominate Persons for Committees; and that none who are nominated, refuse the Service; not that any of the Members shall be hereby debarr'd of their Privilege of nominating Persons if they think fit, or rejecting such as are by the Speaker nominated; in which cases the Opinion of the House shall rule."

It may have been the importance reached by committees in the Revolutionary period that led to the development of a more orderly system of choice. In that period appear, in Massachusetts and New Hampshire at least, rules directing that no member should nominate more than one person for a committee, "provided the person by him first nominated be chosen." Occasionally committees were chosen by ballot; that was the method used in the Federal Convention of 1787. More commonly the tendency was to entrust the selection to the Speaker. The First Congress started off with a combination of the two methods; the Speaker was to appoint committees of three or less; larger committees were to be chosen by ballot, a majority choice being required on the first ballot, and thereafter plurality. This proved awkward and was so unsatisfactory that in the following January the House changed the rule so that the Speaker should name all committees, unless otherwise specially directed by the House, in which case the choice should be by ballot. At the opening of the Second Congress this was simplified into: "The Speaker shall appoint committees until the House shall otherwise determine."

With 1806 began the fight against this course that was to go

[1] Hening, *Statutes at Large*, III, 41.

on spasmodically for more than a century. "For the purpose hereafter of keeping the business of the House of Representatives within its own power," James Sloan of New Jersey moved that all standing committees should be chosen by ballot, and should choose their own chairmen. The shot was aimed at John Randolph, center of so many episodes of parliamentary interest. The arrogant Virginian had held back or refused to make a committee report, and one of Sloan's purposes, he said, was "to prevent in future the most important business of the nation from being retarded by a chairman of the Committee on Ways and Means, or of any other committee," his intimation being that Randolph had kept for months in his pocket or locked in his desk the estimates for the appropriations necessary for the ensuing year. The motion was tabled, but Sloan renewed it at the opening of the next session and came within an ace of carrying it, the vote being 42 to 44. It is said the Northern Republicans feared Randolph's reappointment as Chairman of Ways and Means, and sought to prevent it by taking the appointing power away from the Speaker. Gallatin, however, was much put out because Speaker Varnum replaced Randolph with Campbell of Tennessee.

Thomas Blount of Tennessee tried unsuccessfully for elected committees at the beginning of the next Congress. No better fortune came in May of 1809 to the aggressive Matthew Lyon, who had moved from Vermont to Kentucky and thence returned to Congress. Lyon argued that the "course proposed would be more respectful to the nation; and that the person so appointed would feel a greater responsibility to the House." He could, however, muster to his support only 41 votes against 67. Thereafter for a long time attempts to change the system were few and were confined to specific instances of special committees. In 1832 Speaker Stevenson came very near an affront when Erastus Root moved for the choice by ballot of a special committee on the Bank of the United States. Before the result of the vote was announced a Mississippi man changed his vote, making a tie, which the Speaker broke by giving the casting vote, of course for his prerogative.

In December of 1849 Howell Cobb of Georgia, Democrat, was elected Speaker by two votes over Robert C. Winthrop of Massachusetts, Whig, on the sixty-third ballot, when the strain on the endurance of members had driven them to agree upon plu-

rality choice. Thereupon William A. Sackett of New York proposed that the House appoint the standing committees, the evident expectation being that the Whigs could get enough of the dozen Free-Soilers to vote with them to control the choice, and thus retrieve their defeat on the Speakership. The debate involved the slavery question, so that the defeat of the Sackett proposal throws no light on the technical phase of method of appointment. It was in this contest that when William J. Brown of Indiana on the fortieth ballot came within two votes of an election, it was shown he had bargained off his committees, whereupon his support collapsed.

The matter came up again in 1882, when Godlove S. Orth, a member of long standing and recognized ability, proposed that a standing board of eleven be chosen by party caucuses, and vested with the nomination of all committees. In the Speaker, said he, was a one-man power of vast proportions; from his fiat in assignments there was no appeal; the congressional destiny, prominence, or obscurity of every newly arrived Representative was absolutely at his disposal; he could so constitute a particular committee as to imperil the great interests with which it might be charged; a board need not take more time than did he in organizing the House, since he was never known to accomplish the task in less than two weeks' time. Thomas B. Reed replied, ridiculing such a scheme for putting the Speakership in commission to a log-rolling body, which must favor itself with fine places, or follow the rare historic example of the self-denying ordinance.[1] The test vote on the matter (coming on a question of procedure) stood 162 to 74 against Orth.

In the course of the next three decades the problem became acute. The reforms wrought by Speaker Reed, imperatively essential as everybody now admits them to have been, brought upon him at the time the title of "Czar" and spread through the country the conviction that the power of the Speaker was dangerously excessive. Mr. Cannon's interpretation of the duties of the office fanned the spirit of revolt and "Cannonism" became a political issue. The result was that the 62d Congress (1911–13) took away from the Speaker the appointing power and made the committees nominally elective. At once that became a pretense, a mere fiction. The parties agreed to leave to each other the designation respectively of the majority and minority members of

[1] L. G. McConachie, *Congressional Committees*, 129.

every committee as apportioned in a schedule worked out between the leaders of the two sides. The House merely ratified the results as a matter of form, without question. The Democrats decided to elect in caucus their members of the Committee on Ways and Means, and entrust to them the assignment of the Democratic members of all the other committees. By shuffling the cards skillfully they got the right men on Ways and Means, and have handled the situation to party advantage.

While the Republicans were in a minority and so could get no chairmanships, the method of assignment made little difference, and when they decided on a Committee on Committees it turned out that their leader really did the work. Upon their return to power in the 66th Congress, the Committee on Committees developed weak spots in the system. With too little consideration the caucus accepted a plan whereunder each State delegation should have on this Committee one man who should cast as many votes as there were Republicans in his delegation. This put the control in the hands of half a dozen men from the big Republican States. It would not be right to say that they exercised the power unfairly or unwisely, but it was a dangerous power. More serious was the difficulty in getting discrimination from a clumsy body of twoscore men, each anxious to secure everything he could for his own State. Responsibility vanished. The conditions made almost inevitable a strict adherence to the seniority rule, whereunder the Republican who had served longest on a committee became now its Chairman, with the result that some important chairmanships fell to men whom a Speaker with the appointing power could have undoubtedly placed somewhere else. After observing the outcome various members of long experience averred that the House was decidedly more efficient under the old plan.

The man who presides over the Senate, the Vice-President, has never been treated as one of its members, and he may not be in party sympathy with its majority. So when the select committee gave way to the standing committee system, it was not thought that appointment could prudently be entrusted to him. At periods the task was put in the hands of the President *pro tem.*, of course a leader of the majority; but now, for a long time paying no attention to the printed rule on the subject, requiring choice by ballot, committees of the party caucuses have made up the respective lists, embodying the joint result in a reso-

lution that the Senate adopts perfunctorily. Inasmuch as the membership is not large and changes but slowly, senatorial courtesy is without much difficulty carried to the point of consulting the wishes of every Senator in the matter of his appointments.

In the State Senates where the Lieutenant-Governor presides, like reasons have generally thrown the appointment of committees into the hands of party leaders working through caucuses and committees on committees. One Constitution, that of Oklahoma, has taken notice of the matter, requiring that the Senate shall elect the committees. In four or five States the selection is made by the President *pro tem.*, who is also the majority leader. In Vermont it is by a group of three — the President, the President *pro tem.*, and one Senator elected for the purpose, but the right to overrule these appointments is reserved.[1]

Rules shed little of useful light on the subject, because so often eclipsed by custom. Presiding officers, ostensibly exercising initiative, may be really puppets, with strings pulled by a party leader. When occasionally presumptuous enough to revolt, they get into trouble. In 1915 the President of the New York Senate objected that he had not been consulted concerning certain appointments he did not approve, and refused to accept the responsibility of promulgating them. The party organization thereupon took the appointing power out of his hands and, having vested it in the Senate, put through the slate as voted in caucus.[2]

The reforming spirit that revolutionized the rules of the National House in this particular overflowed into the Legislatures and led ten or a dozen of them to jump into the millennium by creating committees on committees. Pennsylvania was one that tried the experiment, in 1913, but reaction triumphed in the next session and restored to the Speaker his appointing power. On the other hand Nebraska is averred to have derived the greatest satisfaction from the change. The assertion is that it has tended to secure the important places for the members best fitted; and has done away with suspicion of the trading of committee places for votes for presiding officer. There the Committee on Committees is made rather large so as to represent all regions. Utah

[1] H. W. Dodds, *Procedure in State Legislatures*, 38.

[2] *Albany Knickerbocker Press*, January 14, 15; *New York Times*, January 15, 1915; as cited by Dodds, 38.

is also said to have profited by the change, but elsewhere, generally speaking, it has produced little of favorable comment.

Criticisms of the system of choice of committees by presiding officers do not give credit enough for public spirit and good intentions. In spite of all that is said about the payment of political debts, about corporation and other secret influences, and about a variety of motives averred to be improper and unwise, much of which may in some States be well founded, in my judgment the great majority of presiding officers do earnestly and laboriously try to distribute the positions with regard to qualifications and experience. It is also to be said for the system of appointment by the Speaker, that it centers responsibility more than any other system. One of the strange inconsistencies of recent politics has been the subversion of this system at Washington by those who as a group have made a fetish of responsibility. Under the new system, as far as the public is concerned, responsibility has disappeared.

If it is the case that the whole program of legislation ought not to be so completely within the control of one man as may happen where the Speaker abuses the power of appointment, perhaps protection enough can be found in making the guiding committee elective, as in Georgia. There the Rules Committee of the House is to consist of one member from each congressional district, nominated by members from the district and confirmed by the House, together with two from the House at large, elected by the House, and also the Speaker, who is to be *ex officio* Chairman. All other committees, however, are appointed by the Speaker.

Outside the United States, Switzerland is one of the few places where may be found an elected Committee on Committees. It is not so called, but is designated as a Bureau, and is made up in the lower branch of four members, in the upper branch of two, known as *scrutateurs*, who are elected at the opening of the session, and who with the President of each branch respectively have the duty of naming the committee for each measure as it comes along. The *scrutateurs* also determine and announce all votes in the House, for this purpose occupying an elevated position at the right of the President.[1]

In the Canadian Parliament the leader of the majority in each branch moves at the opening of the session the appointment of a special committee, membership specified, to prepare and report

[1] Boyd Winchester, *The Swiss Republic*, 77.

the list of standing committees. Whoever in the course of the session moves the appointment of a special committee may submit the names for its membership unless (in the Commons) objected to by five members; in case of objection, the House chooses, each member having the right to nominate one, those who have the most voices being chosen, together with the mover.

In England the original practice of having committee members named haphazard from the floor gave way to the custom the Canadians have copied for their special committees, of having the member who moved for a committee specify in his motion who should compose its membership. He included his own name unless delicacy led him to get some friend to look out for that. Now the matter has been systematized by the appointment of a Committee of Selection at the beginning of each session. Though nominally chosen by the House, its members are in reality designated by the leaders of the two great parties. It names the committees on private bills and shares with the House in naming those on what Bryce calls "hybrid" bills, but the House nominally chooses those on public matters, though as a matter of fact their membership is in practice determined by the whips of the parties. The procedure might lead one to suppose that partisanship predominates as with us, but in the case of the Committee on Selection as in that of the Speakership, the House of Commons gives more weight than any American body to considerations of impartiality. The committee tries to give due weight, not alone to parties, but also to sections of opinion. In the memoir of Sir John Mowbray, who was its chairman continuously for thirty-two years, we are told that divisions in the committee are rare, and never on party lines.[1]

On the other hand, in the make-up of working committees the English go much beyond us in partisanship, though it is a partisanship of a sort quite different from that which we usually have in mind. As a rule, strong partisans on each side are knowingly and advisedly chosen for select committees of the House of Commons, in order, according to Sir G. C. Lewis, that truth may be elicited from the conflict of opposite and possibly interested opinions. "If such committees consisted wholly of impartial men their investigations would be most unsatisfactory." As neither Alpheus Todd, who quotes this in his "Parliamentary Government in England," nor his editor, Spencer Walpole (edition of

[1] Quoted by A. L. Lowell, *The Government of England*, I, 266.

1892), makes any comment, critical or otherwise, we may assume it to be a typical English point of view.

Anciently quite the opposite conception prevailed. Nobody wholly opposed to a proposal was to be put on a committee. Thus in 1606 one Hadley was excused from being of a committee, declaring himself to be against the matter itself. Jefferson found the theory to be that "the child is not to be put to a nurse that cares not for it. It is therefore a constant rule that no man is to be employed in any matter who has declared himself against it."[1] This did not exclude the man opposed in some particulars, for he might to advantage help amendment. Such a possibility is recognized in the wording of the rule of the Canadian House of Commons still in force: "It should be always understood that no member [of a special committee] who declares or decides against the principle or substance of the bill, resolution, or matter to be committed, can be nominated of such committee."

At least one of the American assemblies started with the same notion, for of the rules of the Pennsylvania Assembly of 1703, one was "that no Member, who is against the body of a Bill, shall be appointed of a Committee concerning that Bill." The "Clerk's Manual" of the New York Senate and Assembly even to-day says that select committees are "nursing committees," so called because all or a majority of their members are favorable to the object of the petition or bill or other matter committed to them; and it differentiates "standing committees" by saying that they, "on the other hand, are deemed to be selected with reference solely to their fitness for the duties generally assigned them, and their capacity to act without bias or favoritism as regards the interest of localities or individuals, where they conflict with the general interest or welfare."

It is to be doubted if this technical interpretation of "select" and "standing" is now generally observed in our Legislatures. "Standing" is rather used to convey the idea of permanence, and in contradistinction to "special." So far have we departed from English precedent that our common conception of any legislative committee clothes it with the nature of a jury, to decide between arguments coming from outside. Although we do not definitely try to confine the committee, as we would the jury, to extraneous information and opinion, yet in the main we look on the function of a committee as judicial.

[1] *Manual*, sec. xxvi.

The conception common on the European Continent goes even beyond ours. It deliberately makes knowledge, partiality, and interest on the part of committee members improbable by introducing into their choice the element of the lot. Where this custom prevails, at the opening of the session the Chamber is divided by lot into groups called Bureaux (France), Sections (Belgium and Holland), Offices (Italy), or some equivalent name, — virtually so many committees, — of equal size, to one and only one of which every member belongs. Their number runs from five in the Netherlands to eleven in France. In some countries they survive through the session, in others, as in France, they are reconstituted by lot every month, or, as in Italy, every two months. Each elects its own Chairman.

These groups are charged with themselves considering measures, or with the appointment of other committees for that purpose. If themselves considering, sitting separately they all study the same measure. After this preliminary examination, if all the groups approve, as in Holland, or a certain proportion, as three out of nine in Italy, each group elects representatives, who meet to discuss the bill in detail and make a report. It will be seen that in this aspect the system is virtually one for naming select committees to consider proposals that have received some measure of approval. Also it may furnish a way for the choice of standing committees, as for example in the matter of the most important committee in France, the Budget Committee, to which each Bureau of the Chamber of Deputies names three members, and of the Senate two. Still another function appears in the Netherlands, where the Chairmen of the Sections, with the President of the Chamber, make up a Central Section, which acts as what we would call a steering committee for directing the course of bills, arranging the order of debate, and the like.

The system was developed with the hope of discouraging the formation and lessening the influence of political groups. In this it has not succeeded. It has done little more than to make group operations somewhat inconvenient. Committee positions are declared to be quite generally bartered by groups and leaders. The strong men control the situation almost as surely as in England or America. The chief weakness of the procedure lies in its waste of time and energy through sending to various committees measures that are in fact allied and might best be handled together. Recognition of this developed in France the change to

standing committees. There, at any rate in the Chamber, the Bureaux have lost all their importance except in the matter of naming the Budget Committee. In 1910 it was provided that the standing committees should be elected by the Chamber, using the principles of *scrutin de liste* and proportional representation, with nomination by party groups.

Yet the system of Bureaux or Sections is not without merits. When the Japanese devised modern institutions for themselves, after studying those of the rest of the world with that intelligence in imitation for which they have become famous, they selected the Continental method of committee choice as the best. It has, indeed, many attractive features. It hampers, even if it does not prevent, partisan autocracy. It works against cliques. It lessens the log-rolling such as is fostered by the abuse of the locality representation theory in American assemblies. It increases acquaintance among the membership of the assembly, and the more that members know of each other, the safer their confidences and the wiser their judgments. It promises every member a fair chance to show his worth. It militates against the advantages of seniority, wealth, birth, social position, personal attractiveness, amiability, good fellowship — the score of circumstances that fictitiously favor one man more than another. It combats all sorts of favoritism and prejudice.

Perhaps among these were the reasons that led to the common use of the lot for the choice of officials in the Middle Ages. As applied to assemblies, it is in France an old institution. We find it in the Assembly of Notables and the States General that met on the eve of the Revolution, and it existed in the ecclesiastical assemblies, and to some extent in the States General, at a much earlier date.[1] Somehow it has not appealed to Anglo-Saxons. Occasionally it has been urged in America, but not successfully. In 1813 Congressmen Cyrus King of Massachusetts presented a proposition for the choice of the Committee on Elections by lot, but the constitutional power of the House to adopt such a rule was questioned and in the end the proposition was defeated. A generation later John Quincy Adams, serving in Congress and severely criticizing its committee system, thought it might be possible to appoint committees by lot, but the suggestion made no headway. Possibly one reason why we do not consider it is that it runs counter to an instinct we have in the past

[1] A. L. Lowell, *Governments and Parties in Continental Europe*, I, 112.

too little valued, but which is beginning to assert itself with more courage — the instinct that tells us men ought to be chosen with their fitness for the work the paramount consideration. Any element of chance in selection must in some degree lessen the likelihood of accomplishing this.

Objection on kindred grounds lies against the proposals made from time to time that committees be selected by what may be called geographical groups. It has been suggested, for instance, that a House divide itself into sections containing as nearly as possible an equal number of representatives from adjacent territory, making as many sections as it is intended to have members on each standing committee, the standing committees to be divided as nearly as possible equally into first and second class committees. The members from each of these sections would then elect one of their own number for each of the standing committees, placing each member as nearly as possible upon an equal number (with other members) of committees of each class, each standing committee so chosen to elect its own chairman. It is argued that under this plan each legislator would have as many votes as there are standing committees, and the persons for whom he must vote would be from his own neighborhood. If he were not acquainted with their character and special qualifications, as there would be only ten or fifteen to select from, he would have time in the course of the campaign and before the meeting of the Legislature to learn their qualifications by association with them and their neighbors, who would be uninfluenced by any lobby, and whose private motives, if any, would be understood by the legislator. The member's vote could then be cast in each case with reference to the particular questions involved. Men of special qualifications could in this way be assigned to duties for which they might be best fitted.[1]

One weakness in such a program, some would argue, is its recognition of locality. Already we attach far too much weight to geographical considerations in all our legislative bodies, large and small. Locality influence is a great drag on good lawmaking. If recognition of locality were made the initial factor in committee selection, would not its importance be still more exaggerated?

Others would take just the opposite view, seeing gain instead of loss. Hilary A. Herbert, who served in Congress sixteen years

[1] James Montgomery Rice, "An Indispensable Change in Legislative Method," *The Independent*, January 1, 1903.

before he became Secretary of the Navy, looked at it that way, averring it to be an "undeniable" advantage of our committee system that it brings members of different sections into close personal relations with each other. "The extent of population and territory, the variety of climate and products, with the geographical distribution of our industries, result in a constant clash of interests. It certainly is desirable that those who are to reconcile these interests should be able to attribute to each other, where they exist, the virtues of patriotism and integrity." [1]

A more important problem is presented by any program for committee choice that does not take partisanship into account. Ours is a government of parties, the chief merit of partisanship is party responsibility, and party responsibility cannot be had without party organization and control. Mr. Wilson, indeed, lays so much stress upon this that he criticizes the representation of both parties on committees and presents arguments in favor of having them composed entirely of members of the majority. The advantage, as he views it, would be a compact opposition to face the organized majority. "Committee reports would be taken to represent the views of the party in power, and, instead of the scattered, unconcerted opposition, without plan or leaders, which now sometimes subjects the propositions of the committees to vexatious hindrances and delays, there would spring up debate under skillful masters of opposition, who could drill their partisans for effective warfare and give shape and meaning to the purposes of the minority. But of course there can be no such definite division of forces so long as the efficient machinery of legislation is in the hands of both parties at once; so long as the parties are mingled and harnessed together in a common organization." [2]

Mr. McCall takes issue with this. "It is by no means necessary to have a committee unanimously of one party, in order that it may report a party measure," he says. "There is always a decided preponderance of membership taken from the party controlling the House, so that upon a partisan question the committee will almost invariably reflect the views of the majority of the House. That being the case, the representation of the minority upon committees rather intensifies than does away with

[1] "The House of Representatives and the House of Commons," *No. Am. Review*, March, 1894.

[2] Woodrow Wilson, *Congressional Government*, 99.

partisanship. Upon all political questions the warfare begins in committee. The provisions of bills are sifted, witnesses are examined and cross-examined, and arguments are made in this miniature assembly as they would be in the House itself. The proceedings often are not lacking in acrimony and party passion, and, when the question is finally brought before the House, both sides are better armed to wage a party warfare. The minority, as well as the majority, is enabled to perfect its policy, and oftentimes it antagonizes the measure recommended by the majority with a bill of its own." [1]

This presentation of the case is accurate in the matter of committees concerned with distinctly partisan questions, such as the Committee on Ways and Means, of which Mr. McCall was long a member, but its application to much the greater part of the committee work in Congress is to be questioned. Just as important a committee as Ways and Means is that on Appropriations, which rarely is affected by partisanship. When its great bills come into the House, the ranking member is likely to make a critical speech for political effect, but within the committee room there has been no factitious opposition. On the contrary, all have worked together for economy. The same harmony of purpose to subordinate partisanship to considerations of the common welfare is characteristic of probably nine tenths of committee deliberations in Washington. I have seen the minority of one committee actually contribute more than the majority to the success of its work, as a result of the fact that several of the minority members had served on it longer than most of the majority and were better acquainted with its problems. No desire for party advantage ever came to the surface. That we were party members was recalled only by some playful jest.

Not long ago the public heard a good deal about congressional committees working by majorities alone. It was told of committee reports on very important measures not seen by the minority until the day of presentation. It was told of meetings to which the minority members were not even invited. If that had been an altogether new thing it might have been ominous, but as it was not unknown in previous stages of congressional partisanship, unexcitable men presumed it was but a recurrent phenomenon, presently again to wane. So it proved, for our entry into the World War drove committee partisanship almost out of sight.

[1] *The Business of Congress*, 56.

It returned to prominence but once in the course of the first Congress after the war. However, this is a period when all party distinctions are largely superficial and artificial. When genuine issues of policy come again, doubtless they will find reflection in Congressional practice.

Some of the State Legislatures are intensely partisan, but I much doubt if in many it is the custom to carry partisanship into the committee room. To my certain knowledge party affiliations are virtually forgotten by every Massachusetts committee. Of course once in a while something may divide because it directly concerns party affairs, such as a matter of reapportionment, but taken by-and-large the Massachusetts Legislature is in practical effect a non-partisan body in its technical processes. Out of several hundred committee votes that first and last came under my own observation, I doubt if a dozen showed any trace of partisan motive or bias.

To be sure, in Massachusetts as in all the other States, the majority control of committees goes to the dominant party, carrying out the theory that one party or the other should in general be responsible for the aggregate product of the session, to be returned to control if that has been good, to be thrown out if it has been bad. Minorities, though, are never so unpatriotic as to try deliberately to make that product bad for the sake of party advantage. Given the chance, they are always glad to try to help make it what they think to be good. Whether it be good or bad, the point is that under the party system the minority is not to be held responsible. Therefore it does not expect to control any committees. Thereby, too, it is kept out of temptation. A notable example of what may follow, on the rare occasions when an American Speaker makes up a committee with a majority out of harmony with the majority of the House, comes from the Congress of 1858, when Speaker Orr gave eight out of fifteen places to members who had voted against the formation of a special committee to inquire into all the facts in connection with the Lecompton Constitution — a vital issue in the anti-slavery fight. This hostile majority of the committee refused to investigate, and the Speaker ruled that the minority has no right to make a report unless there is a majority report, nor even to complain of the refusal of the majority to obey the instructions of the House.

In colonial times it was customary for the Speaker of the Massachusetts House to serve on committees like any other

member. The custom has not survived in Massachusetts, nor has it found much imitation elsewhere. The Speakers of the Illinois and Utah Houses, and the presiding officers of the Pennsylvania and Arizona Senates are *ex officiis* members of all committees, and possibly that is the case in a few other legislative bodies, but not in many. Little is to be gained and much is to be lost by the practice. Whatever encourages the presiding officer to take sides on much of the work is unfortunate. Were he to share in the votes of all the committees, he would be aligned on every issue before it reached the floor. As a matter of fact it would be physically impossible for him to master all the questions enough to warrant his sharing in committee reports, and his influence would be frittered away if he tried to have a finger in everything.

Chairmen

In the origin of select committees may be found the origin of the custom whereunder the man who moves for the appointment of a committee is usually made its chairman. At the outset in effect the mover asked the House to associate with him some other members in the study of a specified subject. As he was supposed to have the most interest in it, naturally he was put in charge, that is, made chairman, and naturally his name stood first in the list. From this it was an easy step to the notion that whenever a committee was appointed, in the lack of any contrary direction the man first named should be chairman. In England this is held to be only a matter of courtesy, every committee having the right to elect if it chooses. Perhaps in theory the same thing is true here, but custom has so firmly entrenched the idea that the man heading the list shall preside as to make it almost unheard of for anybody to suggest another course. Legislative rules in New Hampshire, Rhode Island, West Virginia, Ohio, Michigan, and possibily one or two other States do authorize a committee to elect, but were the authority exercised to the injury of the man heading the list and willing to serve, the usefulness of the committee would not amount to much.

Congress left the matter to usage until 1804 when a singular complication compelled the framing of a rule. John Cotton Smith of Connecticut, who for several years had been chairman of the House Committee on Claims, was excused from further service thereon, and Samuel W. Dana, also of Connecticut, was

appointed "in his stead." Did this make Dana chairman? Dana said No, contending that he was to go to the foot as the last man appointed. The rest of the committee said Yes, and stood their ground until the problem had to be laid before the House. In the end the House decided to frame the rule so as to specify that the first named member would be chairman; "and in his absence, or being excused by the House, the next named member, and so on, as often as the case may happen, unless the committee, by a majority of their number, elect a chairman."

This harmonized with the system of promotion that had been familiar from colonial days in Virginia at least, and very likely in other colonies. Now it has become universal among American lawmaking bodies. It is a dangerous system, for sooner or later the man who has started at the tail end of a committee, if re-elected enough times, will knock at the door of the chairmanship. He may be unqualified to preside over meetings or at hearings. He may have no capacity for defending committee reports on the floor. He may be a man whose reputation for honor is questioned — there are black sheep in every legislative flock. What shall be done with him? The puzzle has perplexed many a Speaker, and will always perplex, until something better than promotion by seniority is discovered.

To single out Congress or a Legislature for blame by reason of this situation is absurd and unfair. Every manager of a commercial or industrial enterprise will testify that he has precisely the same problem, and that few things cause him more anxiety. Whatever the activity, we all know that experience counts for more than anything else, and promotion by seniority is nothing but the recognition of this. The difficulty comes when other considerations demand deviation from the normal. It is a more serious difficulty in Congress and the Legislatures than elsewhere, only because there is more of it. Out of about fourteen hundred chairmen of committees of the National House, less than seventy-five, it has been figured, have served as such for more than two terms. Probably the Legislatures would show a proportion just as pregnant with embarrassments.

A corollary of promotion by seniority is the custom that a man shall not be dropped from a chairmanship without his consent. That custom has been twice broken in the United States Senate, under memorable circumstances. Stephen A. Douglas was in 1859 deposed from the chairmanship of the Committee on Terri-

tories, which he had held since he entered the Senate a dozen years before. The affront came because he differed from President Buchanan on the Lecompton Constitution issue. Likewise it was really due to the President, this time Ulysses S. Grant, that Charles Sumner was removed from the chairmanship of the Committee on Foreign Relations, in 1871, Sumner opposing Grant's San Domingo annexation policy. The reason assigned was that he no longer maintained personal and social relations with the President and the Secretary of State — an unfortunate situation for a chairman of this particular committee. In the case of Douglas it was the Democratic caucus, in the case of Sumner the Republican caucus, that made the decision.

The chairmen of the standing committees of an American lawmaking body are more responsible than any other group for the character of its product. This might be contested by Committees on Rules, and doubtless they do determine the fate of many important questions, but the great mass of legislation depends on committee chairmen. Rarely does a measure become law against the advice of a committee, and rarely does the majority of a committee report against the advice of its chairman. He exercises this powerful influence, however, without any such adventitious aid as comes to the chairman of a committee on a private bill in Parliament. It is the rule in such a committee "that all questions shall be decided by a majority of voices, *including the voice of the chairman*, and whenever the voices are equal, the chairman shall have a *second* or casting vote." May says this deviation from the ordinary rule of voting in select committees was rendered necessary by the peculiar constitution of group committees, consisting of five members only. When one member was absent, a difficulty arose in determining a question without some new regulation; for otherwise two members could have decided every question, although the chairman agreed with the remaining member.[1]

The rule referred to by May in the matter of select committees is that the chairman can vote only where there is an equality of voices. In American committees the chairman usually votes like any other member, dispensing with the formality desirable in large bodies, where the presiding officer may well withhold his vote until the count shows a tie is to be broken. Once I served under a committee chairman who held not only that it was his duty to

[1] *Law, Privileges, Proceedings, and Usages of Parliament*, 303.

refrain from voting in all cases where there was no tie, but also that it was his duty to refrain from expressing an opinion. He was a most annoying chairman, for this reason, and much handicapped the committee.

Chairmen in American assemblies are almost invariably members of the dominant party. Once in a great while a minor chairmanship may be given to an unusually popular member of the minority who can be trusted to make no trouble. Where custom permits escaping the seniority rule of promotion, the most important chairmanships are likely to be assured to men in personal sympathy with the Speaker. His critics, of course, sneer at his giving the plums to his friends, but they would probably do the same thing were they in his place, and in this they would be fully justified. Normally it is the best course for the common advantage. Team-work in a Legislature is just as desirable as in any other joint activity of life. Harmonious coöperation is essential to the best results. With this in mind it is doubtful if praise should be given to the practice, found here and there, of bestowing upon candidates for the Speakership defeated in the majority caucus the chairmanship of the most important committees. Such consolation prizes can hardly be expected to wipe out all traces of resentment and jealousy. Doubtless there are exceptions. A recent Speaker of the New York Assembly gave to a defeated opponent the chairmanship of Ways and Means, not because of his having been a candidate, but in recognition of his fitness for the position, as well as by reason of the fact that he was a warm personal friend. In 1896 E. L. Bogart had said that to this chairmanship, that of by far the most important committee in the House, the defeated candidate for the Speakership was always appointed. He averred it to be by no means unusual for a man to run as a candidate for the Speakership, knowing that he could not be elected, but in the hope that he might secure votes enough to entitle him to this chairmanship, which at that time would have made him the recognized leader of his party on the floor of the House.[1] Since then such compensation of defeat has disappeared as a custom.

Also the leadership in New York has been separated from the chairmanship of Ways and Means. Development in Massachusetts has been along the same lines. Time was when the news-

[1] *Financial Procedure in the State Legislatures*, No. 181 of the pubs. of the Am. Acad. of Pol. and Social Science, September 8, 1896.

paper reporters there had some warrant in speaking of the Chairman of Judiciary as the House Leader, even though the actual leading was insignificant. Now matters are better organized with the ranking member of the Rules Committee (the Speaker being its technical chairman) the recognized floor leader, with a seat assigned to him as such. The lower branch of Congress has gone still farther by keeping the majority leader off all committees of the House. It remains to be seen whether this will be permanently wise. The maintenance of an unofficial steering committee of the majority, with which the leader works, alongside an official Committee on Rules, through which he speaks, may some day develop serious friction. It would seem to be more logical to have the Rules Chairman the leader. Anyhow the leader has enough work to do without being on any other committee. Also the work of no other committee makes its chairman naturally the House leader. Indeed it is only accident that makes the man best fitted to be Chairman of Ways and Means, Appropriations, or Judiciary, the man best fitted to lead the House. Leadership is a task by itself, calling for abilities peculiar and exceptional.

CHAPTER VI

COMMITTEE PROCEDURE

In most of the States the whole committee system, or lack of system, gives the critics ground for demanding radical reformation. As an illustration of the complaint, take that elaborated in a resolution of the Nebraska Legislature of 1913: "The legislative committees are too large or too many, preventing full attendance when important measures are considered, and careful committee work; the House and Senate committees do not meet together and days of delay in the legislative business arise from threshing over the same straw in the committees of both Houses; committees meet at night when the members are weary from the day's session, instead of in the forenoon as is the practice in some States; the work of the sifting committee is unsatisfactory and there is no definite program adopted early in the session."[1] And this covers but part of the criticisms that might justly be made in almost every State of the land. Let us begin consideration of them with the first in the Nebraska list, that relating to size and number.

It would be idle to rehearse the variations in the State Legislatures. Suffice it to say there is no standard. Most of the committees are too large. This has been a fault ever since Virginia developed the standing-committee system. In 1769 six Virginia committees had at the start 186 members, an average of thirty-one apiece, the largest having fifty-six. On top of this came the singular practice of extensive additions in the course of the session, so that at its end six committees had 242 members. Luckily in this particular the example of Virginia found no imitators. On the other hand, there was no disposition to accept the Pennsylvania practice. There as soon as a communication from the President had been read, it was submitted for analysis to a committee of three, who presently reported recommending committees of three, in number sometimes as high as a dozen, upon such of the various subjects mentioned by His Excellency as it deemed worthy of the honor. This practice was applied also to

[1] Nebraska House Journal, 1913, p. 1348.

unfinished business revived from a former session or assembly.[1] Pennsylvania has kept fairly well to its habit of uniformity in size, but has greatly increased membership. The forty-one standing committees of its House have twenty-five members each, except three of thirty-five members, and one of forty.

In Congress there has been a singular lack of size standards. At the opening of the 66th Congress (1919–21) there were 62 House Committees — 1 of 25 members; 3 of 22 each; 13 of 21; 3 of 19; 2 of 18; 3 of 16; 7 of 15; 4 of 14; 4 of 13; 2 of 12; 2 of 11; 3 of 9; 12 of 7; 2 of 5; and 1 of 3. In the course of the session the Committee on Appropriations was increased from 21 to 35. The Senate had 74 committees — 1 of 20 members; 2 of 19; 1 of 18; 5 of 17; 5 of 16; 3 of 15; 3 of 14; 4 of 13; 5 of 12; 8 of 11; 1 of 10; 6 of 9; and the rest of smaller numbers. In the course of this Congress the Senators at last awoke to the inconveniences of the situation and decided that beginning with the 67th there should be but 33 committees — 10 of 15 members each; 7 of 13; 1 of 12; 8 of 11; 1 of 9; 4 of 7; 1 of 5; and 1 of 3.

The growth in the number and size of American standing committees has been one of the remarkable phenomena of our legislative development. It has been partly due to the increase in both the volume and the diversity of business, partly to political reasons pressing for more and more committee places to be distributed as honors or rewards.

If growth in business is a regrettable factor, calling for remedy, nobody would suggest that such remedy be sought in the way of trying to prevent response to the specialization of social activity that is the chief characteristic of our age; in other words, the subdivision of labor that is at the root of our problems social and political. The only other remedy for such pernicious effects as this has produced in the field of legislative labor, speaking of course broadly and not with detail in mind, is to take some part of the business out of the legislating assemblies. This is the English and Continental remedy of entrusting administrative legislation largely to administrative officials or bodies.

The other main cause for the situation is far more simple, can be easily remedied, and ought to receive speedy attention. There is no legitimate reason why committee positions should exist solely for purposes of honor or reward. More than this, their existence adds seriously to the impediments in the way of well-

[1] L. G. McConachie, *Congressional Committees*, 25.

balanced organization and efficient committee work. It needs no evidence to prove that the more committee positions a man is asked to fill, the less efficiently will he fill each. To scatter human energy not only creates fractions, but also often diminishes totals. Furthermore, the time limitations of a session compel interferences of committee hearings and put insurmountable physical obstacles in the way of proper performance of work.

Nevertheless nearly all our legislating bodies have ignored these palpable facts and have brought themselves into situations more or less distressing, largely for the sake of distributing empty honors not worth the ink used to designate them. To illustrate, take at random the figures from a few States. The Illinois Senate with fifty-one members has 558 places on thirty-three committees, about eleven places for each Senator; the House with 153 members has 654 places on thirty-one committees, more than four places for each Representative. The Pennsylvania Senate with fifty members has 295 places on thirty-three committees, about six places for each Senator, not taking into account the fact that the President *pro tem.* is an *ex officio* member of every committee; the House with 207 members has 1070 places on forty-one committees, about five to a Representative. The Georgia Senate with forty-four members has 464 places on forty-four committees, more than ten for each Senator; the House with 189 members has 1015 places on forty-eight committees, between five and six for each Representative.

In the first General Assembly of Iowa the House had fifteen standing committees and the Senate sixteen. In the Assembly of 1915 the House had sixty-one, the Senate forty-four. In the course of the half-century, the House had standing committees on ninety-one subjects, the Senate on eighty. Many of these lasted but two sessions, others not much longer. At the start the usual membership of a committee was five, but since then it has ranged as high as forty-three. The House Committee on Agriculture and that on Ways and Means have had five, nine, twelve, twenty-five, seventeen, and forty members. In 1915 there were 471 committee places to be filled by Senators, more than nine each, and 861 by Representatives, about eight each.

Not all the Legislatures thus handicap themselves. A few pay attention to reason and system. In Massachusetts, for instance, the forty Senators are at this writing asked to fill but 122 committee places, and there are only 319 places for the 240 Repre-

sentatives. Massachusetts uses the joint-committee system for the bulk of the work. The Senate and House have separately organized committees on Rules, Judiciary, and Ways and Means (though they sometimes sit jointly), and a few small routine committees, but the great mass of the business is handled by thirty joint committees, ten of which are made up of three Senators and eight Representatives each, and the other twenty of four Senators and eleven Representatives each.

In 1911 the committees of the Wisconsin Senate were reorganized and were reduced in number from twenty working committees to five. This gave each of the five a larger membership and placed each Senator on but one working committee. In the "Senate Manual" of 1913, Chief Clerk F. M. Wylie said this resulted in wider consideration of measures in committee; gave the committee reports more weight on the Senate floor, saving time there; and made possible continuous work by all of the committees and full attention to committee work by each Senator. Previously committees had often been compelled to adjourn because of the absence of a quorum. The Nebraska Legislature has also proved able to reform itself in this particular. In 1915 the number of the Senate committees was reduced from forty-two, having 255 members, to twenty-eight, having 168 members; of House committees, from forty-seven, with 496 members, to thirty, with 248 members.

The conflict of committee duties in point of time is of course more hurtful in upper branches, for they are the smaller bodies, thus requiring each Senator to cover much more ground than confronts a Representative. Mr. Underwood pointed out to the National Senate, June 13, 1918, the reasons why the business in the committees of the House was far more carefully and earnestly considered than the same legislation at the hands of the Senate committees. In the House almost universally a member had only one important committee assignment, and he had ample time to give his entire attention to the business before that committee. In the Senate, of necessity, with the size of the committees and their number, all had to be assigned to several more or less important committees. Repeatedly he had sat in a committee of the Senate having most important legislation before it, yet with only a simulated quorum of six or seven Senators hearing the witnesses and discussing the pending question for days, and then, when the final vote was to take place on the measure, in-

volving matters of great importance, Senators had appeared in the committee room to vote who had not heard the debate in committee, who had heard but little of the testimony, and who were voting on the request, suggestion, or information of some other Senator who was taking a partisan side of the question.

In May of the following year the Republicans, coming into control, took a step toward meeting the situation by an agreement that no Senator should be chairman of more than one of the most important ten committees, nor a member of more than two of them. This was along the line of action taken by the Democrats in the House some years before when they had the majority, like action being taken by the Republicans when they succeeded to the control in 1919, with agreement that no Republican member of any one of ten specified committees should be assigned to any other standing committee.

An interesting suggestion of another possible method of relief appeared in the California Assembly Daily Journal of January 12, 1917, in an announcement by the Speaker suggesting a tentative schedule of committee hearings. The proposal was that committees should be divided into groups, and no member be assigned to two places in the same group. This might work out usefully if certain days in the week should be assigned for the hearings of the committees in each group.

The chance of conflict between duties is increased by the practice, wherever it may prevail, of referring matters to two committees sitting jointly. This practice seemed reprehensible to the Massachusetts Joint Special Committee of 1911 created to consider the practicability of shortening sessions. The reason advanced for urging the discontinuance of the practice was that it only redoubled the evils of having a large number of men attempt to wrestle with big problems, and of losing in joint work time that should be taken up by each committee with its own work. To my mind the interference with regular committee schedules and the resultant difficulty in getting a full attendance is a defect just as troublesome.

Of course what should be the size of a committee is in some degree an arbitrary and conventional matter, and yet in the determination there are certain conditions that ought to be kept in mind. The committee has three functions: first, the acquiring of information and opinion from outside; next, the forming and formulating of judgment from within; thirdly, the persuading of

the House to adopt the conclusion reached. For the first and third of these, the committee can hardly be too large. The more numerous the members who have at first-hand heard the testimony and have listened to the arguments detailed with a length and thoroughness far more likely to be adequate than in the case of debate on the floor of the House, the more intelligent will be the judgment, with the less likelihood of its being affected by caprice or accident. The more numerous the members who have conceived a personal interest in the measure and who are imbued with the *esprit de corps* natural to committee membership, the more efficient will be the defense of the committee report.

On the other hand, the forming and formulating of preliminary judgment call for a membership small enough to permit that desirable interplay of ideas which is found to be most effective when but a few men sit round a table. The common experience of mankind is that boards, trustees, directors — in brief, conferring groups of all sorts — work to best advantage when they comprise from five to fifteen members. A larger number invites the formalities of oratory; may require some elevation of voice; brings the hampering influences of ceremony; discourages candor, frankness, bluntness; lessens the likelihood of attendance and punctuality; and weakens personal interest by diminishing personal sense of responsibility.

The committees of the National Senate average to have about a dozen members each; of the House, about fifteen. In the House of Commons the most usual number of a select committee is fifteen. Experience on committees of fifteen and of eleven members in the Massachusetts Legislature has led me to the conclusion that on the whole the committee of eleven is somewhat more advantageous, but the arguments nearly balance. Nearly all the committees of the Massachusetts Convention of 1917 numbered fifteen, and their work was satisfactory. The Committee on Rules and Procedure, with nineteen members, proved a little too large.

The committee system of that Convention was carefully planned to secure one most desirable result. Barring the members of the Committee on Rules and Procedure, no delegate was assigned to more than one committee, and every delegate had one assignment. The plan worked admirably. No man could excuse himself for neglecting committee work by the difficulty of being in two places at the same time. In three weeks the Con-

vention sat but once, leaving that period almost wholly free for committee work, and on resuming its sessions found that nearly all the committee reports were ready. This permitted the arrangement of an orderly program for debates, which was followed with reasonable accuracy.

Of course it was impossible to apportion the work among the committees so that their burdens were equal, but the approach to equality was much closer than is found in a legislative session. The difficulties in this matter and the common lack of any attempt whatever to meet them have caused much of the prevalent criticism of the committee system, and indeed lie at the root of much of the inefficiency of our whole legislative system. Invariably some of the committees have far more to do than they can do well; some have far less to do than they could handle. Even so well-regulated a Legislature as that of Massachusetts has failed to solve this problem. In a recent session two committees were asked to consider less than twenty-five bills each; twelve, between twenty-five and fifty; eight, between fifty and a hundred: six, between one and two hundred: two, more than two hundred. In the Illinois General Assembly of 1917, of 1041 bills introduced in the House 183 went to the Committee on Appropriations and 277 to the Committee on Judiciary, these two committees thus getting numerically forty-four per cent of the work.

In Congress the situation is in some aspects even worse. In one term out of more than seventy Senate committees (as the number then stood) and nearly sixty House committees, only thirty-one Senate and thirty-two House committees acted on bills that became law. It was the judgment of Asher C. Hinds that only sixteen of the House committees were really desirable, for they handle nearly all the legislation of the House.[1] Samuel W. McCall set a smaller number, saying that the chief work of the House is transacted in the first instance by fewer than a dozen committees, although at times half a dozen more may be prominent.[2] Speaker Champ Clark reduced importance to still smaller dimensions, saying in the House, December 14, 1917: "In the popular estimation the four great committees in this House are Ways and Means, Judiciary, Appropriations, and Foreign Affairs. Actually the members of the House know that in addition to these two the Committee on Interstate and Foreign Com-

[1] "The Speaker and the House," *McClure's*, June, 1910.
[2] *The Business of Congress*, 47.

merce and the Post Office Committee are forcing themselves into that same class. These are the six committees that are always the greatest of our legislative committees. Occasionally some other committee becomes exceedingly prominent."

On the face of it this state of affairs deserves the savage criticism of which it is from time to time the target. Certainly there is grave question of the expediency of a system under which two thirds of the members of the House have no part in its most important work. Yet nothing ever exists without something to be said for it, however weak the reasons advanced may seem in the eyes of the critic. In this instance a searcher for defense might find a peg on which to hang an argument, in the fact that inevitably the membership of any large assembly will vary greatly in respect of capacity and experience. Even distribution of talent among all the committees will result in each having a few strong men, with the rest of the membership made up of those less active, industrious, or gifted. Is this necessarily a better plan than to have the more important work concentrated in a few committees made up chiefly of those believed to surpass in aptitude for lawmaking?

What may be called either the aristocratic system or the oligarchic will never lack for defenders, but it has palpable weaknesses of no small consequence. It invites to favoritism on the part of whoever selects. It proceeds on assumptions about relative merit that are often fallacious and always uncertain. It attaches undue weight to showy qualities, makes too little account of the undemonstrative virtues. It arouses jealousies and heartburnings. It brings a great element of chance into the congressional career, disappoints many capable men, deters others from running the risk of idle oblivion. Many who suffer from the system feel precisely what Representative Alvan T. Fuller of Massachusetts put into words when in February of 1918 he resigned his place on one of the ornamental committees and in his letter to the Speaker denounced the system. He did not wish by continuing his membership to appear to give even tacit consent to the existence of a useless committee. "Why," he asked, "could not some of these needless committees that never meet, and that are occupying valuable room and employing secretaries and messengers that have no work to do, be utilized for various useful purposes, such as inspecting camps, soliciting labor for shipyards, doing any one of the hundred and one things that the

Government is in need of to-day? Instead of this you and I know that two thirds of our committees are useless and instead of being really busy the majority of our congressmen down here are telling stories and practising up to see who can spit the farthest."

This reference to the habits of some of his associates was not graciously received, and caustic rejoinder followed, but nevertheless there was meat in his attack on the committee system. It ought to be possible to give at least some work to any and every committee permitted to survive.

Why is ineffective life continued? It is for several reasons, of trivial consequence, yet not without explanation. The honor of even a useless chairmanship is not unwelcome to all men, and if the world demolished all its empty honors, no small part of the sum total of human happiness would disappear. More practical are the benefits coming directly with a chairmanship. A committee chairman is likely to get somewhat more and better office room than otherwise; more of clerical assistance; and some small printing privileges. The other members of the ornamental committees get nothing but material for making an impression on credulous constituents. Can it be seriously said that these things justify the system?

Large committees that are overburdened may meet the situation by the use of sub-committees. These are a common resort in Congress. Made up of from three to five members, usually with minority representation, these sub-committees attend to the technical part of lawmaking. They do a great deal of hard work and handle it so efficiently that as a rule, when the full committee has been in agreement as to the result to be accomplished, the bills as drawn by the sub-committee are approved as written. The Ways and Means Committee, up to the time of our entry into the World War, followed the ancient doctrine that measures should be framed by their friends, and its sub-committees were made up of members of the dominant party. In the 63d Congress, for the preparation of the Underwood tariff bill, there were seventeen sub-committees of three or four members each, usually three, selected from the Democratic members of the full committee. The practice has been resumed.

Congressmen differ markedly in opinion over the utility of sub-committees. Representative Burton L. French, writing on the subject in the "American Political Science Review" for

February, 1915, said there were then ten sub-committees of the Committee on Interstate and Foreign Commerce, each of which had to do with fairly different work, yet during the time W. P. Hepburn was its chairman there was but one standing sub-committee, that on "Aid to Navigation." When the committee was under the leadership of James R. Mann, there were no standing sub-committees; select sub-committees were at times appointed, but Mr. Mann held firmly to the conviction that the matters for the consideration of the committee could best be handled mainly through the deliberations of the committee's entire membership. "The whole question of the advisability of maintaining sub-committees," says Mr. French, "is open to debate and there are those who would abolish all, or practically all, sub-committees and insist upon the committees of the Congress being the smallest units for the handling of the work."

In Iowa, where the larger committees of each branch have from one to two score members, it is said often to happen that a chairman, in order to keep his committee under control, will name small sub-committees of his friends to handle particular matters, appointing as the chairmen of sub-committees men who will heed his advice. Thus his wishes may get undue weight.

Joint Committees

The Nebraska stricture, by reason of the days of delay from threshing over the same straw in the committees of both Houses, is particularly worth attention, not only because the injury is so widespread, but also because the remedy is so simple and so well-justified by long experience. The joint-committee system found in Massachusetts, Connecticut, and to lesser degree in a few other States, furnishes a solution of the problem that is complete and perfectly satisfactory. Under this system all bills are referred to committees made up in part of Senators and in part of Representatives, with the exception that, in Massachusetts for example, some of the Ways and Means work and some of the Judiciary work is handled in separate sittings. The procedure committees, which do not pass judgment on the merits of bills, such as those on Rules, Engrossed Bills, and the like, sit separately. Rhode Island, New Jersey, and Wisconsin Legislatures do part of their work with joint committees. Several States have them on matters of finance. The Wyoming rule says that "any standing committee of the Senate acting with the corresponding

committee of the House, may, by vote of the two Houses, act together as a joint committee for the preparation and introduction of bills of general interest, and such bills may be introduced simultaneously in the two Houses." Many of the States use joint committees for mere formalities. On the whole, however, it may be said that the system is a New England system. A New Englander may be pardoned for saying that there are various good things in New England, not elsewhere appreciated.

It probably would have been the national system, prevailing in Congress and in most if not all of the State Legislatures, had it not been for Lord Culpeper, Governor of Virginia. He found that customarily members of the Council (which was in effect the upper branch) had been sitting with the Committee on Propositions and Grievances of the House of Burgesses. The defense of this practice was that otherwise every measure adopted by the Burgesses would have to be deliberately explained to the members of the Council before there could be any hope of its acceptance, which would inevitably cause great delay and indirectly increase the burden of taxation. It was deemed to be especially desirable that members of the Council should sit with the committee that had to do with litigation, its work being essentially judicial, and the argument was put forward that as appeals coming to this committee had been made to the two branches jointly, each should be represented at the hearings. The Governor, however, thought the practice repugnant to the usages of Parliament. It is said the House had the restoration of the former regulation so much at heart that for eighteen days its members declined to go on with the public business.[1] If the practice had become established in Virginia, undoubtedly it would have been taken into the Federal Congress, for at the outset the Virginia members of that body were exceedingly influential and they engrafted thereon most of the parliamentary procedure to which they were accustomed. In turn the newer States, for the most part looking to Congress for example, would probably have taken over the joint-committee system.

In the session of 1913 California seriously considered the entire recasting of her legislative procedure. A carefully drawn system of rules was prepared by Senator Leroy A. Wright, embodying what he considered the best practice in all the State

[1] P. A. Bruce, *Institutional Hist. of Virginia*, II, 465, citing *Colonial Entry Book*, 1682–95; also see Hening, *Statutes at Large*, I, 497.

Legislatures. One of its prominent features was the adoption of joint committees similar to those in use in Massachusetts. The system as a whole failed of adoption, but several of the suggestions were accepted.[1]

Congress has less than half a dozen joint standing committees. They exist chiefly because of certain administrative powers given to them by statute, and only in exceptional cases do they act jointly with reference to proposed legislation. In the early days, however, the advantages of joint committees were not wholly ignored. Henry Clay made use of them in a noteworthy instance. The Missouri Compromise of 1820 admitted Missouri as a State without restriction as to slavery. The Convention to frame a Constitution contained two clauses very objectionable to the anti-slavery forces. One forbade the Legislature to interfere with slavery; the other directed it to pass laws to prevent free colored persons from settling in the State. This brought up the issue anew in the next session of Congress. The House wanted the admission of Missouri made contingent upon dropping these offensive clauses; the Senate did not object to their presence. Clay ended a bitter fight by securing the appointment of a joint committee, which accomplished what has been called the Third Missouri Compromise.

Also in the early days of Parliament there were instances of the appointment of joint committees, but the practice did not grow and for many years there were none at all. Revival of the plan was urged in 1854, but it was held to be impracticable. Then in 1875 a committee of the House of Commons on Acts of Parliament recommended the reference of private bills to joint committees, on the ground that this would introduce greater simplicity, more rapidity, and corresponding economy. Sir Thomas Erskine May, the great parliamentary authority, warmly advocated the proposal, and declared that had it been adopted in 1854 it "would have saved the promoters and opponents of private bills many millions." Mr. Gladstone also strongly approved the idea.

The chief obstacle in the way of the adoption of the suggestion in 1854 was the supposition that it was a privilege of the Commons to have on a joint committee twice as many members as the Lords. By 1869, however, it appears to have come to be understood that the numbers from each House should be equal.

[1] *Am. Pol. Sci. Review*, VIII, 244 (1913).

The presumed necessity for this has in Congress and most of the Legislatures been likewise the most serious difficulty. Yet the experience of Massachusetts warrants the emphatic assertion that the difficulty is wholly fanciful. Of course in a committee made up of four Senators and eleven Representatives, the Representatives can outvote the Senators, but what of it? If the Representatives reflect the temper of their House, they will in the end block any measure they oppose, and they cannot secure affirmative action without the consent of the Senate. The skeptics miscalculate because they assume there is something binding and final in a committee report. Yet it is nothing more than a preliminary expression of opinion, to be taken by each branch for what it may be worth. What possible reason is there why a Senate should be unwilling to pay attention to the advice of eleven Representatives, or a lower House to the opinion of four Senators? What have the relative proportions of the numbers to do with the soundness of the advice?

It is only as a matter of practical convenience that more Representatives than Senators are put on a Massachusetts joint committee. The House is six times as large as the Senate, giving six times as many Representatives as Senators among whom to split up the work. Never is there any thought of rivalry or jealousy or dignity or precedence. Doubters elsewhere have worried lest the petty prerogative of presiding over joint-committee sessions would make trouble. That never worries a Massachusetts legislator. For the Senate Chairman to preside, is taken as a matter of course; in his absence the House Chairman presides; both away, the ranking Senator present takes the chair. Not a trace of friction ever appears.

In point of theory the most serious objection to the joint committee springs from the singular belief that somehow it is inconsistent with the purposes of the bicameral system. It is said to have been on this ground that Vermont in 1917 abolished all joint committees. As a matter of fact the change in the rule hardly warrants so describing what took place. Previously the rule had said that Senate and House committees might meet together as a joint committee and make a joint or separate report. This was changed so as to direct that though committees might sit together, they must take action and report separately. Here there seems to be recognition of the absurdity in arguing that in the gathering of information joint committees present anything

inconsistent with the spirit of the bicameral system. As for the other committee function, that of advice, it appears to me far-fetched indeed to suggest anything savoring of unconstitutionality. The two bodies remain perfectly free to accept or reject the advice. What can there be of impropriety in looking for advice wherever convenience and expediency may suggest?

Other difficulties are referred to by L. G. McConachie in his comprehensive work on "Congressional Committees." He bestows praise on the Massachusetts system, saying (in Appendix IV, p. 366) that it "saves time and expense, divides business equally between the two branches, and minimizes the liability to misunderstanding," but he goes on to add: "For a number of reasons it is more practicable in a State than in the national legislature." However, the reasons that he submits (243–45) seem for the most part to go to the essence of the system rather than to have exceptional force in their application to Congress, and as they doubtless would be urged also in the State Legislatures not familiar with the system, they should be examined in the light of Massachusetts experience.

Besides speaking of the balance of members and the possible jealousy between the branches, Mr. McConachie refers to the "objections to concentration of power in a few hands which are urged against the ordinary standing committees," and says they "apply with manifold force to a joint committee." The answer is that these objections are unsound, and that if they had any validity in themselves, the necessity of subsequent judgment by separate Houses would minimize their consequence.

He further says "it has proved difficult, if not impossible, to punish contumacious witnesses." No such difficulty, so far as my knowledge goes, ever appeared in Massachusetts. Anyhow, it could be met completely and with the greatest ease by joint rule or by statute.

"The slow process of concurrent resolution is necessary to instruction and discharge." Massachusetts almost never either instructs or discharges a committee. Under a sensible system it is not necessary.

In explaining why joint committees were distasteful to the House of Lords, Sir Thomas Erskine May gave two reasons that we may be thankful do not apply in this country — the right of members of the Commons to meet their lordships without the respectful ceremonies observed at a conference, and their share in

the privilege of taking the evidence of sworn witnesses. Neither privilege nor punctilio puts a member of an American Senate on a higher plane than that of a Representative — for which Heaven be praised!

Over against these objections, unsound and chimerical as for the most part they are, put the very clear and positive gains of the joint-committee system. In the first place, it is a great saver of time, not only for the lawmakers, but also for those of the public who may be particularly interested. To require twice in a matter of public concern the attendance of petitioners, witnesses, and opponents is grossly unfair and stupidly wasteful. This, we have seen, is recognized in Vermont, where though committees must take action and report separately, they may meet jointly for public hearings. On the principle that half a loaf is better than no bread, this is good as far as it goes, but it throws away another time-saving opportunity of the joint committee, for when preliminary conference shows that the men who ordinarily epitomize the attitude and feeling of each House cannot harmonize their views, it is loss of energy to let one group proceed with work almost certain to be thwarted by the other. If, however, preliminary conference can bring out something generally acceptable, time will be saved on the floor of one House or the other, perhaps both. Thus will be accomplished a prime purpose of the committee system, namely, the working out of detail as far as may be, prior to study in the main body.

In this matter of detail there is distinct benefit in some measure of preliminary agreement that will avoid the danger arising from discussion in the two Houses of measures meant to accomplish the same purpose, but differing in particulars. If Senate and House committees sitting separately report independent bills to the same end, controversy may center on the differences in detail rather than on the main principle at stake. If a joint committee has reported, the emphasis is more likely to be on the principle approved than on what might have been the points of disagreement between two committees.

The man who goes to Congress after experience in a Legislature where the system of joint committee prevails, finds it hard to comprehend anybody's patience with the complications, confusions, errors, and delays resulting from independent bills for the same purpose handled separately by the two bodies. The clumsy, time-taking machinery of the conference committee is

called into play chiefly to smooth out differences that would have been quickly settled in a joint-committee session. If these differences reach the floor, as when a committee of one branch reports with amendments a bill that has passed the other branch, the attention of the pugnacious members is thereby called to issues often insignificant, with wasteful debate the result. The process of substituting the bill of one branch for the bill of another in order to gain time or escape trouble, invites the acceptance of undesirable details that ought to be changed.

The effects appear to be even worse in the Legislatures. For example, we are told that in 1910 in New York, with half the bills introduced in both Houses, there were about fifty cases where the same measure passed each House, and then passed one House a second time. There were seven cases of duplicates where the same bill passed both Houses twice and the two identical bills were sent to the Governor. Two were discovered and recalled and five were left for the Governor's veto. There were a few cases of duplicate bills where each bill passed its own House, but failed to pass the other.[1]

Sometimes under the separate-committee system undue advantage seems to accrue to bills introduced in the upper branch. Doubtless this may be accounted for in part by the probability that measures not coming from outside, but conceived by members themselves, are more wisely conceived by Senators than by Representatives. Yet it is also probable that the initial impetus given by the Senate is more potent in the House than that given by the House is in the Senate. Such adventitious influences are avoided by joint-committee reports No pride of authorship, nor prejudice against authorship, affects either body. This extends in a measure to amendments made on the floor. If one House makes changes in a measure reported from a joint committee, they are less likely to arouse obstinacy in the other House than would like proposals coming in conflict with the report of its independent committee.

Experience shows that in actual working the joint-committee system allays rather than fosters prejudice and suspicion — a result precisely the opposite of that feared on the score of pride and jealousy. Members of the two branches in the personal contacts of the committee room make friendships inconsistent with mistrust and enmity. They come to understand and sympathize

[1] David Leigh Colvin, *The Bicameral Principle in the N.Y. Legislature*, 58.

with each other's motives and purposes. Without in the least impairing the individuality and self-reliance of the two branches, this encourages harmonious coöperation. Few things surprise a man going to Congress fresh from the joint-committee system, more than the detachment of Senate and House. As bodies they are strangers to each other. Save for conference committees, they might almost as well sit at the opposite extremes of the continent, or at different times of the year. The leaders confer once in a while, no doubt, but for the rank-and-file there is neither acquaintance nor interest. Rarely does a Senator deign to enter the House. Rarely does a Representative go to the other end of the Capitol from motives other than those of curiosity, unless he has occasion to consult a Senator from his own State in some personal or political matter. The joint-committee system would break down unfortunate barriers.

Still another benefit of the system lies in lessening the influence of presiding officers. However high-minded and disinterested they may be, yet on the whole it can hardly be denied that ordinarily they would better not concern themselves with, at any rate, the detail of legislation. If the membership of a committee owes its very existence altogether to one man, and its work is to be largely at his mercy, there cannot fail to be an element of deference in its attitude, to put the case mildly. The joint committee escapes these personal obligations; it does its own thinking.

Finally, the avoidance of responsibility is made harder. At the best there is altogether too prevalent a tendency for each House to pass measures to be killed in the other. With independent committees this evasion of duty is facilitated. They can report slightly different bills, in the expectation, perhaps with an understanding, that each shall pass the House in which it is reported, and then be rejected by the other, allowing a majority in each House to get on record as favoring the principle, while secretly thwarting its application.

Because of these merits the few Congressmen really familiar with the joint-committee system were encouraged when in April of 1922 standing committees of Senate and House came together for hearings on the President's proposal for ship subsidy. Perhaps in the course of time this example may come to be often followed. Should it result in complete adoption of the system, great benefit to the processes of national legislation will accrue.

Hearings

Severe criticism is often visited upon the committee system by reason of the circumstances of hearings and deliberations. The justice of the complaints and the wisdom of the remedies proposed cannot be appraised without knowledge of the historical phase of the subject and understanding of the principles involved.

When American legislative practices were taking shape, Parliament had developed a clear conception of its relation to the individual citizen. The right of petition had been long established. Also conclusion had been reached about the right to be heard in behalf of or against a petition, but this was held to be quite another matter.

If the conflicting claims and interests of individuals were in issue, with no distinct relation to the public welfare, the proposed measure was called a private bill and the parties were heard before the committee much as if it were a case in court, with the exception that in the first instance only the petitioners were heard. If the committee concluded to grant the prayer and brought in a bill, and if then the adverse parties asked to be heard, it was usual to make an order for the hearing of both sides.

If a petition or proposal related primarily to the public interests, that is, distinctly concerned the common welfare, there were two classes of persons who might seek a hearing: first, those who thought the purpose desirable or objectionable from the public point of view; secondly, those who thought it desirable or objectionable by reason of its bearing on private rights or interests. At first blush it might seem as if the second group should get no consideration whatever and that the first group should get every consideration. Precisely the opposite was the conclusion that Parliament reached. It held the function of determining what was desirable or objectionable, from the public point of view, to be peculiarly its own function, in the exercise of which it needed — more than that, should take — no advice from outside. Also it held that though the public interest should be paramount, yet the public interest ought to be subserved with the least possible injury to private interests, and for this reason private interests endangered ought to be heard.

It will be seen that these theories have nothing whatever in

common with such conceptions of the purpose of committee hearings as prevail, for instance, in Massachusetts. On the other hand, they adequately explain the origin of the attitude of Congress and many of the State Legislatures.

It will be further seen that these theories involved or implied a right to be heard on private bills, but that in the matter of public bills there was developed no right of hearing akin to the right of petition, for the hearing of private parties adversely affected by a public bill was a privilege granted rather than a right recognized. On this side of the water it has generally been held that no right exists in any case, whether public or private. When in 1888 the congressional Committee on Ways and Means saw fit to decline to listen to certain tariff arguments, the criticism of its course led C. P. Breckenridge to say in the May number of the "North American Review": "No one has a right as a matter of right that he shall be heard by a committee of the House. The constitutional right of petition to Congress has nothing whatever to do with the claim to be heard in argument before a committee. It is a matter of discretion with a committee as to the mode in which it will seek information concerning subjects referred to its consideration." In Massachusetts, where the greatest latitude is given to hearing petitioners and remonstrants, although they have no rights recognized by rule or statute, their status being wholly a matter of custom, yet custom has secured to them about all that statute or rule might give.

The Massachusetts attitude is the incarnation of the agency spirit, the idea that public opinion is to have free access to legislators, moulding their decisions as it may. The attitude of Parliament, reflected in most of our legislative bodies, is the incarnation of its own judgment. Naturally the same attitude is found on the Continent of Europe, where at any rate up to the time of the World War there was even less of true democracy than in England. Committee meetings of the Continental assemblies are as a rule private, in the sense that none but members of the Chamber have access to them, and in France privacy is so strict that unless the Chamber passes a special resolution, even Deputies are excluded from attending committees of which they are not members. The new Constitution of the German Commonwealth (1919) specifies that the meetings of the Standing Committee on Foreign Affairs shall not be public unless the committee by a two-thirds vote otherwise provides. It shows,

however, imprudent liberality in directing that sittings of committees of investigation shall be public, though permitting the exclusion of the public by a two-thirds vote.

There are other aspects of the matter. Judgment, whether of a trustee or of an agent (assuming that some degree of discretion is vested in the agent), must be based on information. To get information is one of the chief purposes of hearings. Anything that impedes this is undesirable, but it does not follow that a committee should necessarily expose itself to the time-wasting process of acquiring information through indiscriminate volunteering on the part of whatever citizens choose to present themselves. Reliance on that process brings in a great element of chance. Only by accident will it happen that the men best qualified to inform will be in attendance. If a committee is to be assured of help from experts on the subject in question, it ought to invite or even require the presence of those who know. This precaution is of much more real importance than various of the nostrums commonly prescribed for committee evils. Critics would do well to shift their emphasis.

Should committee sessions be open to the public?

The question ought to be divided. There are really two issues, but in the mass of more or less misinformed acrimony on the subject that has furnished a chapter to the muck-raking agitations of recent years, the two have generally been confused. Fairness calls for determining first whether hearings ought to be public, and secondly whether deliberations ought to be public.

In Massachusetts and such other States as follow her example, hearings are almost invariably public. In Congress hearings are sometimes public, sometimes private. Investigations often proceed behind closed doors, for the manifest reason that otherwise some witnesses would not be frank, perhaps would not attend, putting themselves if possible beyond the reach of the committee. In various States — Iowa, for example — committee meetings are not public in the sense that any person may attend without special permission or invitation. Interested persons often ask permission to present their views, and sometimes a committee invites persons to appear.

Judging by Massachusetts experience, there is no valid objection to having the doors wide open whenever any outsider is speaking. So little is ever to be gained by hearing anybody in "executive session," and such a hearing makes so much trouble

by reason of the criticism it arouses, that publicity might well be an invariable rule. Delayed publicity of the sort secured by the congressional practice of printing the transcript of stenographic notes, does not go far enough. If there is anything in the testimony that the public wants to know or ought to know, it should be at the command of the press at the moment. Interested outsiders should have immediate chance to correct misstatements of fact, or, in the legitimate ways open to them, to rebut arguments.

It is the Massachusetts custom to invite the attendance of the public by advertising hearings in the newspapers; by announcing them as far as practicable in a semi-weekly bulletin that gives a thorough record of the status of committee work; and by a daily calendar ready each afternoon, listing the hearings for the following day. Much of the money spent on advertising has been wasted. The placing of it has been largely within the control of the clerk of each committee, and too much of it has gone where it might bring some political advantage through currying favor with publishers, rather than where it might attract the most attention. Scattered without system among various papers, there is no one advertising page where all of it can be found, and probably in the aggregate it accomplishes less than is secured by the enterprise and public spirit of one paper (the "Boston Transcript") that runs the complete list daily in its news columns. The official advertising is phrased with the waste of words customary in legal announcements. Nothing but lethargy and indifference prevents the systematic publication of complete lists in condensed form in the important papers of the different counties, at the public charge, with a total outlay probably smaller than that now incurred, and at any rate with far more publicity. This ought to be one of the tasks of a Clerk of Committees. Were such an official created, another of his duties should be the systematic assignment of hearings, with proper classification of the petitions in appropriate groups. The Massachusetts Special Committee on Legislative Procedure recommended in 1915 the creation of such an official. He would be worth while in any Legislature.

Congress has been strangely slow to see the advantages of system in these matters. Massachusetts members, familiar with the great conveniences of the practices in their General Court, have tried in vain to induce Congress to imitate them.

The value of the opinion brought out by hearings is as uncer-

tain as that of the information. The opinion is the more dangerous, for misinformation can be corrected, but there is no test for opinion. Ponder it for a moment, and you will see the risk in drawing inference as to the opinion of two million or so of adult human beings in a State like Massachusetts, from the views expressed by five or fifty persons in a committee room. It may be said that these are the persons most interested, which may or may not be true. Often it is not true. Unfortunately the persons attending are usually extremists, biased, uncompromising. Therefore no cautious legislator refrains from having at hand, metaphorically speaking, a bag of salt from which he may take many grains when he listens to speakers addressing a committee. The most to be said for opinion so furnished is that it may help.

Whatever the real value of the information and opinion brought out by public hearings, there is another consideration not to be neglected. "I read of a custom," said Sir Robert Philips to the House of Commons in 1627, when asserting the right of free speech in Parliament, — "I read of a custom among the old Romans, that once every year they had a solemn feast for their slaves, at which they had liberty without exception to speak what they would, thereby to ease their afflicted minds, which being finished, they severally returned to their former servitude." In my own opinion not the least, and perhaps the greatest, of the advantages of public committee hearings is their service as a safety-valve. If the wild reformer, the crank, can but be heard, he is often content and thereafter for a while will do little mischief. Bottle him up and he will explode. If his imagination fall short of the extreme, if he be not too unreasonable in his dreams, but merely somewhat ahead of his time, what he may say will help toward that instruction of public opinion which in time makes the world better. Many a useful reform has marched slowly and tediously through the committee rooms of the Massachusetts Legislature, year after year, in the end reaching its goal. Public hearings educate.

The valid criticism of public hearings bears on their conduct. Often this is most unsatisfactory. Speakers are hurried or cut short. A deliberate, well-balanced, complete argument is next to impossible. Time presses, more want to be heard than the hour or two permits, committee members wax impatient. Brevity is requested or ordered. Topics deserving hours must be disposed of in minutes. Here as in every other stage of the lawmaking

process, overwork shows its baneful effect. The mischief will never be remedied until administrative details, the minutiæ of legislation, are relegated to more fitting tribunals.

Meanwhile a useful palliative might be found in regulations governing procedure. The Joint Special Committee on Legislative Procedure in Massachusetts recommended in 1915 that the President of the Senate and the Speaker of the House draft a set of such regulations for the guidance of chairmen. The special committee thought that there should be the same dignity, the same judicial impartiality as in a court hearing, and that those who appear either as proponents or opponents of legislation should know what to expect, and govern themselves accordingly. To-day, some chairmen allow questioning and cross-questioning from persons not committeemen, others refuse such privileges; some allow rebuttal, others do not. Many times chairmen fail to grant a proper division of time to both sides. People come long distances in opposition to a measure, sit and listen to proponents from Boston or the State House corridors all the forenoon and are then told that the opposition will be heard the next day! It would be a simple matter to divide the time into alternate hourly periods for each side, to have speakers hand in their names, and to have questions submitted in writing to the chairman.

The Special Committee did not exaggerate in saying that "the method of procedure is dependent upon the whim of each individual chairman." It might have defended the present generation by pointing out that sundry unfortunate results are nothing new. For proof that at any rate we have not fallen from a state of grace, turn to Harriet Martineau's lively description of what took place in a Massachusetts committee room more than eighty years ago, after Governor Edward Everett in his message of January, 1836, had expressed the opinion that the anti-slavery movement would injure the condition of the slave and endanger the Union. That part of his address relating to the subject was referred to a joint committee of five, and to the same committee were referred the communications from Governors of Southern States demanding the passage of laws against abolitionism. Harriet Martineau, strong abolitionist, passed that winter in Boston and described the committee hearing: "I could not have conceived that such conduct could have been ventured upon as that of the chairman of the committee. It was so insulting as to disgust the citizens present, whatever might be their way of think-

ing on the question which brought them together. The chairman and another of the five were evidently predetermined. They spared no pains in showing it, twisting the meaning of expressions employed by the pleaders, noting down any disjointed phrase which could be made to tell against those who used it, conveying sarcasms in their questions and insult in their remarks. Two others evidenced a desire to fulfill their function, to hear what the abolitionists had to say."

At a second hearing, Dr. Follen was stopped, as he was showing that mobs had been the invariable consequence of censures of abolitionism passed by public meetings in the absence of gag-laws. "He was desired to hold his tongue, or to be respectful to the committee; to which he replied, in his gentlest and most musical voice, 'Am I, then, to understand that, in speaking ill of mobs, I am disrespectful to the committee?' The chairman looked foolish enough during the applause which followed this question. Dr. Follen fought his ground inch by inch, and got out all he had to say. The conduct of the chairman became at last so insufferable, that several spectators attempted a remonstrance. . . . The abolitionists held a consultation whether they should complain to the Legislature of the treatment their statements had received, and of the impediments thrown in the way of their self-justification. They decided to let the matter rest, trusting that there were witnesses enough of their case to enlighten the public mind on their position. A member of the Legislature declared in his place what he had seen of the treatment of the appellants by the chairman, and proposed that the committee should be censured. As the aggrieved persons made no formal complaint, however, the matter was dropped. But the faith of the abolitionists was justified. The people were enlightened as to their position; and in the next election they returned a set of representatives, one of whose earliest acts was to pass a series of anti-slavery resolutions by a majority of 378 to 16." [1]

[1] *Retrospect of Western Travel*, II, 167, 168.

CHAPTER VII

COMMITTEE DELIBERATIONS

The second phase of committee action, that of deliberation, judgment-forming, conclusion-reaching, deserves quite independent consideration. Here the onslaught has been led by no less a person than Woodrow Wilson. In his book on "Congressional Government," and a score or so of years afterward in that on "Constitutional Government in the United States," he described in a hostile spirit the secrecy of the deliberative processes in the committee rooms of Congress, but it was in "The New Freedom" that he reached downright censure. Said he (p. 125):

"The light must be let in on all processes of lawmaking. Legislation, as we nowadays conduct it, is not conducted in the open. It is not threshed out in open debate upon the floors of our assemblies. It is, on the contrary, framed, digested, and concluded in committee rooms. It is in committee rooms that legislation not desired by the interests dies. It is in committee rooms that legislation desired by the interests is framed and brought forth. There is not enough debate of it in open house, in most cases, to disclose the real meaning of the proposals made. Clauses lie quietly unexplained and unchallenged in our statutes which contain the whole gist and purpose of the act; qualifying phrases which escape the public attention, casual definitions which do not attract attention, classifications so technical as not to be generally understood, and which every one most intimately concerned is careful not to explain or expound, contain the whole purpose of the law. Only after it has been enacted and has come to adjudication in the courts is its scheme as a whole divulged. The beneficiaries are then safe behind their bulwarks."

And farther on (p. 129):

"This is what sometimes happens: They promise you a particular piece of legislation. As soon as the Legislature meets, a bill embodying that legislation is introduced. It is referred to a committee. You never hear of it again. What happened? Nobody knows what happened. I am not intimating that corruption creeps in; I do not know what creeps in. The point is that not only we do not know, but it is intimated, if we get inquisi-

tive, that it is none of our business. My reply is that it *is* our business, and it is the business of every man in the State; we have a right to know all the particulars of that bill's history. There is not any legitimate privacy about matters of government. Government must, if it is to be pure and correct in its processes, be absolutely public in everything that affects it. I cannot imagine a public man with a conscience having a secret that he would keep from the people about their own affairs."

In the light of all this it is not without interest to note that when Mr. Wilson and the statesmen of the Allies conducted the epoch-making Council at Paris in 1919 and they were sharply attacked by the press because of the paucity of information given out, it was explained that owing to the conflicting views of the powers upon many questions and the necessity of reaching conclusions by unanimous vote, the decisions reached were often in the nature of a *compromise*, and that premature discussion of the issues by the public at large would greatly hinder such agreement. So it was deemed impossible to admit representatives of the press.

Whether or not this episode led Mr. Wilson to modify his views about "pitiless publicity," those that he had expressed in his writings deserve serious attention by reason of the standing, learning, and ability of their author. Due respect forbids any harsh characterization, and yet the temptation is very strong. Any man who has approached the question from the other side, anybody who has had actual experience of work in legislative committees (which had not been Mr. Wilson's fortune), must find it hard to be patient with such views.

Can you watch the workings of the mind? Have the men of science yet invented an instrument that will photograph the brain in action? Who can measure motives? What process can be devised that will prevent a public man from having a secret? And what has conscience to do with the mental process of forming a judgment?

It may, of course, be said that the public ought to hear every argument addressed to that judgment, whether advanced by an outsider or by a fellow member. But is not that purely fanciful? Would it be suggested that no legislator ought ever to converse with a fellow member or anybody else about any measure in hand, unless a reporter were within hearing? Nothing short of that would disclose the particulars of every bill's history, which

Mr. Wilson says we have the right to know. The contention is wholly unpractical, and not justified by any rule of conduct in the daily relations of life.

Furthermore, if such a thing were feasible, it would be impolitic. Why does the doctor talk privately with his patient, the clergyman with his parishioner, the lawyer with his client, the manufacturer with his superintendent? It is not alone to foil idle curiosity and escape gossiping tongues. The psychologists will find you a reason of far more importance. Men pose when strange eyes are fastened on them and strange ears are open to their words. No man is the same in private and in public. The more numerous the observers and auditors, the less the frankness, sincerity, confidence. Universal experience tells us that in all manner of conference and deliberation, we reach results more speedily and satisfactorily if those persons directly involved are alone. Behind closed doors compromise is possible; before spectators it is difficult. Men are loath to recede from their positions, however extreme, if it must be done under the eyes of a critic. It will be said that this is a reason why committee conference should be open, but since compromise enters usefully into all other human relations, why exclude it from the committee room? Were compromise in legislation thwarted, the wheels of government would stop.

When a man thinks his words are to be repeated, he has an eye to the ultimate consumer. Instead of talking solely to those who are to make the immediate decision, he frequently talks with remote effects in mind. This would turn a public committee conference into a sparring spectacle for personal or party advantage. It is for this reason that parliamentary law frowns on any reference in debate to what has been said in committee conferences. For the same reason it is not discreet to encourage the practice of repeating in conversation or to reporters the details of deliberation.

The complete justification of privacy is that its absence would enure to the injury of the public business. Common acceptance of this keeps anybody from seriously suggesting that the meetings of either the British or the American Cabinet should be public. In England the public is kept in the most complete ignorance of what goes on in Cabinet meetings. The minister who talked of their details would shock the sense of decency and lose his portfolio. In the United States the same need of privacy is

felt. Mr. Wilson said: "Government must, if it is to be pure and correct in its processes, be absolutely public in everything that affects it." Notice that he did not restrict his dogma to legislative processes, but demanded that government must be absolutely public in everything. Yet "pitiless publicity" was not provided for the meetings of his own Cabinet.

In discussing this matter Mr. Wilson used the word "secret" with an invidious implication. Other critics likewise employ the word, and "secrecy" as well, meaning to suggest something evil. Yet it is as unfair to say that legislation is secret, and therefore inferentially vicious, as it is to say that justice is secret, and therefore inferentially vicious, because juries deliberate in private. Of course the analogy if extended farther would be inexact, because the practices of the courts prevent any arguments from reaching juries except publicly, which would be impracticable in the case of committees, and because committees must explain and justify, which is not true of juries. But in the matter of deliberation, the two are alike, and in this particular when it is shown that the policy of the jury system is wrong, then may the same policy be rejected for the committee system. Neither in the jury room nor in the committee room does secrecy, if you please to call it such, involve any element of shame or fear or deceit. Legislators are neither cowards nor tricksters because they deliberate in private. They are but using in the public business those methods that have been found most efficacious and salutary in all the other relations of life. Those methods are based on the characteristics of human nature. He who would quarrel with them should not rest until he has changed human nature itself.

Attendance and Votes

Regardless of whether committee sessions are public or private, they present sundry opportunities for reform. One of these, the chance to improve attendance, would promise more were it not so ancient as to make us fear it must be the result of an incurable weakness of human nature. R. V. Harlow has collected instructive instances of what happened in the Revolutionary period. He found that all the way from Pennsylvania to Georgia there was the same tale of failure to attend meetings. Usually members dodged their responsibilities in this respect, and it took much prodding on the part of the chairman to get them to do

anything. In the Pennsylvania House a member once remarked that "every Gentleman must be sensible of the difficulty with which Committees are collected"; and again, "business consigned to a large Committee was done by a few of its members or not at all." In regard to a certain petition which had been referred by the Virginia House to a select committee, George Mason wrote that the members seemed inclined to favor it, "if this can properly be said of men who are too indolent to attend to anything. The Committee have met, or rather failed to meet, at my lodgings every morning and evening for this fortnight." In North Carolina an irate legislator once complained that "the want of punctuality among members in attending committees has called for the exercise of more philosophy than I possess." In Georgia carelessness in this respect became so general that the House was forced to impose a fine of sixpence on members who did not come to a committee meeting within fifteen minutes of the time fixed by the chairmen; if they did not come at all, they were fined two shillings.[1]

Committee habits have not changed. Invariably a quorum is not present at the appointed hour. Yet it is as unsafe to assume this as to assume that a southern railroad train will always be late, and so there is heartrending waste of time by interested persons who fidget anywhere from ten minutes to an hour before proceedings begin. Members are constantly coming and going, with the result that only a very few of them hear the whole case. The petitioner generally goes away carrying a feeling of resentment and disgust, with the belief that he has not been treated with respect, sometimes not with common decency.

The situation is far from being peculiar to the United States, but probably we have been more lenient toward it than other countries. In Sweden, if a committee member is absent for three consecutive sessions without lawful excuse, his place is to be filled by a new election. Besides, there is a unique way of securing full attendance at committee meetings, which may be commended to the consideration of American Legislatures. In addition to the regular number of committee members, each House is required to select supplementary members, in the proportion of one to every two, to serve in cases where regular members are unable to attend — what we should call substitutes or alternates. It is the duty of a regular member who knows he cannot be

[1] *Legislative Methods in the Period Before 1825*, 114.

present to inform the chairman or secretary in time for one of these alternates to be summoned, the number of votes they had received at the time of their election determining the order in which they shall be called.

In the English Parliament, unless leave of absence has been obtained, a member cannot excuse himself from serving upon committees to which he may be appointed, or for not attending them, where his attendance is made compulsory by the orders of the House. In 1846 W. S. O'Brien declined to serve as a selected member of a railway committee, and the Committee of Selection, not being satisfied with his excuses, nominated him to a committee in the usual manner. He did not attend the committee, and his absence being reported to the House, he was ordered to attend the committee on the following day. Being again absent, and his absence being reported to the House, he attended in his place, and stated that he adhered to his determination not to attend the committee; upon which he was declared guilty of contempt, and committed to the custody of the sergeant-at-arms.[1]

The quorum of a select committee of Parliament is in each separate case fixed by the House. Generally it is three for a committee of the Lords, five for a committee of the Commons, but these numbers are varied at pleasure. A committee cannot proceed without a quorum, and in 1849 it was made the duty of the clerk to call the attention of the chairman to the absence of a quorum at any time, in which case he was to suspend the proceedings until a quorum could be procured, or adjourn the committee to some future day. The quorum of the so-called "Grand Committee" of recent development, having at first sixty to eighty members and now forty to sixty, is twenty.

Formal quorum requirements for committees are rare in the United States. From the stipulations of about a dozen Constitutions that there shall be committee action on bills, and of two that committees shall be in session to consider bills, it has been inferred that valid action might be conditional on the presence of a quorum. But what is the quorum? Not necessarily a majority, for that is only an arbitrary figure, and though common, not universal. The quorum of a Committee of the Whole in the lower branch of Congress is but a hundred — less than a quarter of the

[1] Sir Thomas Erskine May, *Law, Privileges, Proceedings, and Usages of Parliament*, 190.

membership. However, it may be assumed that the majority quorum is the normal thing. So it is laid down in "Jefferson's Manual." The rules of the National House are silent on the point, but as they say "Jefferson's Manual" shall govern where applicable and not inconsistent with the standing rules and orders, it would meet this question.

To the Senate "Jefferson's Manual" furnishes the parliamentary code, but in this particular there has been departure. Stirred to action by the growing difficulty in securing the attendance of a majority at committee hearings, and unwilling to reduce the number of committees and thus lessen the number of members getting the perquisites of chairmen, in 1912 the Senate decided that thereafter a committee might determine its own quorum, though this was not to be less than one third of the membership. It was, however, still required that a majority of a majority, that is, one more than a quarter of the full membership, should concur in a report. The change proved to be no check on a long-established practice of evading the quorum requirement by a poll taken as convenience permitted, usually by sending the clerk of the committee to absentees in order to get their approval.

In September of 1919 this led to extended debate and a formal recognition of the situation. It was found that a certain measure which had been under consideration for some time had never been passed upon in a session of the committee reporting it, when a quorum was present, but a poll had been taken after the fashion customary in the case of most of the minor bills. It chanced that some thought this not a minor bill, or else it was thought a good time to settle the parliamentary question. So a point of order was made. The presiding officer ruled against it and was sustained, but by only two votes. The technical phase of the ruling was that the Senate, by making a rule permitting points of order to lie against reports of conference committees when they have exceeded their authority, had implicitly denied such points in the case of the reports of other committees. As the matter was left, committee majorities could thereafter with the support of this precedent completely ignore minorities if they saw fit, not even giving them a chance to hear bills read in committee. The dangers of this were pointed out by the leaders of the party dominant in the Senate at the time, but singularly enough the spokesmen for the minority deliberately abandoned their own protection. Doubtless the reason was that as a practical matter the

strict application of old principles had been found to be no longer feasible, in view of the growth of work.

Criticism of reporting without a vote in a formal session attended by a quorum has appeared in some of the Legislatures. For instance, it is said that, regardless of the constitutional provision in Pennsylvania directing that there shall be a committee report on each bill, committees frequently report without a meeting. The chairman may secure the individual assent of a majority of his committee, or late in the session he may merely rise in the House and ask if any members of his committee are opposed to his measure; and if strong objection does not appear, he reports the bill favorably. Against such procedure a point of order that a bill was not considered in committee, will not be sustained, as it is not competent for the chair to go back of the committee report.[1]

M. Clyde Kelly tells us of a Pennsylvania instance where it was charged and never denied that the chairman of a committee had alone held a meeting and reported on a number of measures, among them being three "pinch" bills introduced by himself.[2] Not a single member of the committee was found who had been present at the meeting when such action was taken. Of course that sort of thing is quite indefensible, but it is hard to see any harm in getting individual approval separately for sundry routine matters over which there can be little or no dispute. Ordinarily a chairman would not be foolish enough to risk a report on a controverted bill without the formal approval of a majority of a quorum. Lacking this he would invite defeat on the floor. It is the part of wisdom for him to assure himself in advance of the support of as many of his associates as he can. Therefore the very conditions of the case preclude any great amount of abuse in the way of proceeding without formal authority.

However, there are those who see enough danger here and in other directions to warrant demand for better regulation of committee action. The argument was set forth by the Massachusetts Special Committee on Legislative Procedure in 1915, when it advised that a roll-call record be kept of the attendance of committee members at hearings and executive sessions. "Many a man's record on roll calls has affected his election, yet the committee work is fully as vital a part of legislative activity as any, and it

[1] H. W. Dodds, *Procedure in State Legislatures*, 46
[2] *Machine-Made Legislation*, 43.

would seem to be as interesting to a man's constituency to know whether he was faithful in his duty in that respect as well as in the other. It would be well to provide in some way that attendance should mean more than slipping into the committee room, recording himself, and slipping out again." The Committee believed that such a record could be prepared under the direction of the committee clerk or his assistants in such a way that no injustice would be done to a member of more than one committee meeting the same day. This record could be tabulated week by week and presented to the Legislature before adjournment Friday in order that it might appear in Monday's Journal. As a further step, in order that there might be some hold over a few members, it was recommended that the presiding officer be given the power to "excuse" or remove, in his discretion, chronic delinquents. As in the case of other admirable recommendations of the committee, at this writing nothing has been done.

By Joint Resolution No. 46 the Wisconsin Legislature of 1911 made provision in the matter of committee hearings that in some respects is in advance of anything else that has come to my attention, and ought to be studied by every other legislative body in the land. Each committee is to keep a record, in which is to be entered: (*a*) the time and place of each hearing and each meeting; (*b*) the attendance of committee members; (*c*) the name of each person appearing before the committee and of the person, firm, or corporation in whose behalf such appearance is made; (*d*) the vote of each member on all motions, bills, resolutions, and amendments. This record is to be read and approved at the next regular meeting, and at any rate within ten days. So much of it as pertains to a bill or resolution reported upon is to be entered on a sheet accompanying the document, and a duplicate is to be filed by the Chief Clerk in such form as to be most accessible for the members and the public.

The rules of the Illinois House, but not the Senate, make like requirements. Dodds says that at the end of the session in which the rule was adopted, no deliveries were made to the Secretary of State as had been provided. At the following session complaint was early made that bills were being reported unaccompanied by a report of the roll-call, and it is doubtful if Illinois has even yet succeeded in her purpose.[1] Had the votes of committees been entered on the Journals, the members could not have avoided

[1] *Procedure in State Legislatures*, 48.

going on record, for it would have been in the power of the minority to have made trouble by protesting.

The rule of the Minnesota House lacks the provision for filing with the report, for though the records are to be filed with the Clerk, and, after the session, with the Secretary of State, and at all times to be open to public inspection, no time for filing is directed. The West Virginia Senate calls for a committee record book in which shall be entered the time and place of meetings, the attendance of members, and the names of persons appearing, with the interests represented; a member may have a notation made as to the cause for his absence at a previous meeting, and in the want of such an explanatory note, the presumption is to be that the absence was without reasonable excuse. At the end of the session this book is to go into the archives. The Vermont Senate and House require a similar record book, and make provision that it shall include lists of persons requesting to be heard, the notice, if any, given to them, and the votes. In the case of committees of the New York Assembly, with minor exceptions, the names of the members present when a report was agreed to and how each member voted thereon are to be entered on the Journal of the House. The Senate requires only that a report of a committee, made otherwise than by a majority of the committee present at the time the report is made, shall give the names of the members of the committee favoring such report.

The record of votes is sometimes secured without specific rule about record of attendance. Thus in the Florida House a committee report is to include a record of the Yea-and Nay vote. The Iowa House also requires a Yea-and-Nay-vote in committee on a motion finally disposing of a bill, but excepts the committees on Appropriations and Judiciary. Minutes of committee meetings are to be properly kept and at the end of the session filed with the Chief Clerk.

In the British House of Commons since 1829 the name of every member addressing questions to witnesses before select committees has been published with the minutes of the evidence; and in 1852 the same practice was adopted by the Lords. Sir Thomas Erskine May thinks the requirement not unimportant, by reason of its extending the personal responsibility of members as well to the House as to the public. "It displays the intelligence, the knowledge, and the candor of the questioners; or their obtuseness, ignorance, and prejudice. It exhibits them seeking

for truth, or obstinately persisting in error. Their presence at each sitting of the committee, and their votes upon every question, are also recorded and published in the minutes of the proceedings." [1]

In Iowa a committee is not to take final action on the same day on which a public hearing has been held. The wisdom of this is very doubtful. To be sure, it prevents precipitate decision and gives time for the reason to throw off the spell of eloquence or forget the appeal to sympathy. Every man learns by experience the wisdom of "sleeping on" a proposal. Nevertheless, there is great advantage in reaching a conclusion while facts are fresh in mind, before the pressure of a legislative session has dimmed the memory with an intervening throng of problems. Furthermore, decision ought to be made by those who have heard the testimony and the arguments. Delay often gives the controlling votes to members who were absent, who have none but second-hand information, and who are informed as to but one side of the case. Perhaps a wise solution would be reached by requiring an immediate vote after a hearing, to be subject to reconsideration within a specified number of days. This of course should apply only to a brief, simple bill containing but one important proposition. In the case of complicated matters, nothing more than a test vote on the general question of policy involved should be taken forthwith.

Reports

The impression prevails that letting committees refrain from reporting on measures referred to them — the process described as pigeonholing, suppressing, smothering — is the common practice among the State Legislatures. As a matter of fact, however, provisions intended to prevent this are found in about three quarters of the States. The favorite course is to specify a certain number of days within which the committee shall report. This ranges from four days in the Nebraska Senate and the Colorado House to twenty-five in the Minnesota Senate, with ten days the most common number. The half-dozen States where only a week or less is allowed for committee deliberation evidently attach no value to duly advertised hearings, an orderly schedule, and thorough work, for that is impracticable if reports must be made no more than seven days after commitment.

[1] *Const. Hist. of England*, I, 408.

A variation of this course appears in the Connecticut joint rule directing that a committee shall "report its opinion" on each measure referred to it "within two weeks of final action by the committee." Why even two days of delay should be permitted after final action is inexplicable.

Another method is to set a day on or before which all reports shall be made. Thus a New York House rule says committees shall make final report on or before April 5. Massachusetts goes into detail with the schedule set forth in the rules. The session begins on the first Wednesday of the year. Petitions, bills, etc., are to be in the hands of the Clerks by the second Saturday thereafter, and are all referred before the fourth legislative day following. Reports are to be made by the second Wednesday in March, but by concurrent vote the time may be extended until the second Wednesday in April, and in practice this is always done without question if a committee wishes. Thereafter if the Committee on Rules advises against further extension, it may be had only by four-fifths vote — a provision never called into play, but effectually serving to scare or shame committees into expedition, for no committee chairman likes to ask for more time. The Wisconsin Assembly has made some progress toward system by a rule that all business referred to a committee shall be taken up within two weeks, and by requiring that each chairman shall report every second week the number of bills on hand. This is a gain over such a perfunctory rule as that of the California Senate, where committees are to report "as soon as practicable," or the spineless requirement of the New Hampshire House that "the committees shall promptly consider and report on all matters referred to them."

A dozen or more of the Legislatures prefer to approach the problem by rules meant to furnish a way of compelling the committees to make report. This remedy was to some degree an outcome of the reforming spirit that reached the acme of its importance in the Progressive campaign of 1912. In Pennsylvania, for instance, up to that time the rules provided that though a committee might by simple majority vote of the House be discharged from further consideration of a bill, it should not be so discharged if ready to report. They further provided that a negative report of a committee could be overthrown only by a majority vote of all members elected. The result was that a committee compelled to report on a measure it did not favor made a

negative report, which was never defeated, for the requirement of an absoute majority made defeat practically impossible. When the rules were revised in 1913, in order to limit the power both of the Speaker and of the committees over the action of the House itself, change was made in this respect so that sixty members (a little less than one third of the whole membership) might discharge a committee, and that a majority of those voting might place a bill on the calendar.

In the Maryland Senate, which gives committees twenty days on measures introduced in the first thirty of the session, and fifteen days on those coming in later, a bill is to be returned on demand of any three Senators unless extension of time has been granted; and the feelings of the committee are to be soothed by the knowledge that "such demand shall not be construed as a reflection upon or a discourtesy to any such committee." In the New Jersey House on the written request of fifteen members a committee must report within twenty-four hours. The author of a bill that has been held by a committee of the Indiana Senate for six days, or any other member, may call the fact to the attention of the Senate, and unless the time is extended, the bill must be returned on the next legislative day, either with or without recommendations.

The rule of the Illinois Senate says a majority of the Senators elected may recall a bill, which would seem to imply that a casual majority may not. Any Ohio Senator may demand return after fifteen days, and this is to constitute a demand of the Senate itself, bringing the bill or resolution at once before that body. In the Utah House the Speaker on four days' notice may require report. Five Tennessee Senators may compel the Committee on Rules to recall any bill and place it on the calendar. In the North Dakota House any bill (except an appropriation bill) not reported in five days goes automatically on the calendar of the Committee of the Whole. A member of the California House may at the end of fifteen days request report, and if then it is not made within three days, the House may vote for return of the measure. In the Missouri Senate after ten days on the request of any Senator a bill is considered to have been returned.

Two of the States have put the subject into their Constitutions. Kentucky said in 1890: "Whenever a committee refuses or fails to report a bill submitted to it in a reasonable time, the same may be called up by any member, and be considered in

the same manner it would have been considered if it had been reported." Michigan, in 1908, limited the power of the Legislature to make its own rules, by saying it "shall not adopt any rule that will prevent a majority of the members elected from discharging a committee from all further consideration of any measures."

It is in the direction of discharging committees that the National House has looked of late for relief from what sundry statesmen deem the tyranny of the situation. In the early days of Congress it was possible to discharge committees without serious trouble, but when business had grown to the point of compelling keen contest for precedence, it became apparent that if motions to discharge could be freely made, they would sadly interfere with orderly routine. In 1867 Speaker Colfax stated incidentally that a motion to discharge a committee was not a privileged motion. In 1884 it was proposed that when a bill was not reported within thirty days after reference, a motion to discharge should be in order, but Thomas B. Reed and Samuel J. Randall pointed out the impracticability of the suggestion and it was rejected by 56 to 115. A straight-out ruling on the question of privileged motion came in 1898, from Speaker Reed, in the negative, and he was sustained by 169 to 125. He knew and a majority of the members knew what it would mean if the friends of each of twenty thousand measures could demand privilege for a motion to discharge.

Yet the situation was not satisfactory. The only way to get at an obstinate committee was through the Committee on Rules, and this was of no help to the minority, or indeed to a majority not pugnacious enough to coerce the leaders. Discontent gathered strength through a dozen years and then in 1910 reform in this particular was made one of the tenets of insurgent faith, with the result that there was achieved what was hailed as an important victory. A "Calendar of Motions to Discharge Committees" came into being, which every Monday was to give members a chance to pull their pet measures out of the grave. Under the rule as adopted in 1910 and amended in 1912, notice of such motions is to be given at least seven days in advance, and recognition for them is to be in the order in which they have been entered. The motion is not to be submitted unless seconded by a majority by tellers. If that is secured, there may be twenty minutes of debate, and then the motion to discharge must get an affirmative vote of a majority of the full membership. The hopes

of the reformers were dashed by the result. Said Representative Campbell on the floor of the House December 6, 1915: "There was not one bill or resolution considered on that calendar in the 63d Congress, for the reason that the rule is not workable." It remains a dead-letter.

In the eagerness to coerce committees, it has generally been overlooked that turn-about is fair play and that they ought to be protected in a reasonable chance to do their duty. This has been taken into account by the New York Assembly, which says that a standing committee is not to be discharged from the consideration of a measure except by a vote of a majority of all the members elected. No committee is to be discharged, nor is an adverse report on a bill to be received, until after reference the bill has been printed and put on the desks of members, and subsequent thereto the committee has held a meeting, or in case of no such meeting ten days have passed since the bill was placed on the desks of members. In the Pennsylvania Senate, "no committee shall be discharged from the consideration of a bill within five days of its reference, without unanimous consent of the Senate."

There can be such a thing as too much haste demanded of committees. Long and complicated measures deserve even more study than the usual limitations of legislative work permit. The impatience of the newspapers in this regard sometimes passes the bounds of reason. They seem to think celerity the only virtue a Legislature should cultivate. They want perfected laws to begin coming out of the hopper within two or three days after the members assemble, and thereafter they are ever hurrying the stream. From their criticisms the public gets the notion that the Legislature is lazy, procrastinating, indifferent. Meantime the really important work of the session is going on out of sight, where earnest men behind closed doors are wrestling with big problems, trying to reconcile differences, smoothing out difficulties, polishing language, anxiously striving to accomplish a result that shall be for the public welfare; in short, performing as best they can the most difficult task in all the world, that of making good law. Be patient with them. Give them reasonable time.

All the legislative rules on the subject of committee reports are to be taken with a grain of salt, most of them with many grains of salt. Few formal requirements are more modified by custom. Often the rules appear to be wholly ignored. For example take

Iowa, where the House requires a report within ten days, unless extension of time is voted. In 1915 only about one third of the bills were retained by House committees less than ten days. The Senate rule, requiring report within fifteen days, was somewhat better observed, but a separate rule regulating the appropriation committee was not enforced at all, nor was a like rule in the other branch. Of four resolutions in the House asking for reports on bills that had been retained more than ten days, only one was adopted. When committees reported within the time limits, they evidently did so at their own pleasure. Hichborn in his "Story of the California Legislature of 1909" says (p. 12) that in spite of the Assembly rule requiring all bills to be reported back within ten days, the Commonwealth Club bills, referred to the Judiciary Committee January 15, were not acted upon by the committee at all. They remained in the committee sixty-seven days. The Direct Primary bill was held up in the Senate Committee on Election Laws from January 8 until February 16, though the Senate rule called for report "as soon as practicable."

These typical instances suggest why it is impossible to estimate how general may be the actual practice of smothering bills in committee. There can be no question, however, that it is widespread. Professor Reinsch found that during a period of years in Illinois, on the average about thirty per cent of the bills referred did not issue again from the committee chamber.[1] On the other hand, H. W. Dodds informs us that at the 1915 session the committees of the lower House in Illinois reported more than three quarters of the bills referred to them. Dodds also says [2] that in the same year the committees of the Ohio Senate killed twenty-six per cent of the bills introduced in that body, while forty-nine per cent of House bills met their fate in the House committees. In Indiana and Kansas less than fifty per cent were stifled in committee and in Michigan less than forty per cent. The percentage of committee executions to total number of bills considered in New York averages about thirty-five in the Assembly and forty in the Senate. In South Dakota all bills except those of the most trivial character are reported favorably from the committees. Professor Reinsch concluded that it is in the States where the political organization is strong that the percentage of bills smothered is largest. The reverse of this may be

[1] *American Legislatures*, 169. [2] *Procedure in State Legislatures*, 57.

one reason why in Massachusetts a General Court never dreams of going home until every bill has been reported, but then the habit of living up to rules is strong in Massachusetts.

The United States is not the only country where this feature of legislative work has made trouble. In 1903 the French Chamber of Deputies found it necessary to provide that every measure sent to a committee should be reported within six months; if not reported, its author may demand that it shall be placed on the orders of the day. Lowell thinks that Crispi's chief motive in urging the change of system made by the Italian Chamber of Deputies in 1888 was to prevent committees from smothering bills. After a long struggle, a process of three readings was provided, whereby the Chamber could, if it desired, order a general debate and vote on a bill before it was referred to a committee, and in that case, the main principle of the measure having been approved by the Chamber, the discussion of the committee was limited to a consideration of details. It was also provided that in case a committee did not report within thirty days, the Government or any member of the Chamber might move that a day be fixed for the second reading of the bill.[1]

In the face of such widespread recognition of the danger in giving committees unlimited power of suppression, it would be idle to argue that there is no need of remedy. On the other hand, to require report from committees on everything referred to them has its regrettable side. This was pointed out in 1915 by the Special Committee on Legislative Procedure in Massachusetts, where the policy of reporting everything prevails absolutely. "Frivolous matters," the Committee declared, "take up too much time in the Legislature, to the exclusion of more important matters. No one objects to using a great deal of time in the proper consideration of weighty matters of State-wide interest. But frittering away the sessions of the House and Senate on some picayune bill, reported on adversely by the committee, calling for an increase of salary or special compensation for some individual, or some person's attempt to evade civil service rules, or to seek redress for some fancied grievance, seems unfair when we consider the great expense of maintenance of the Legislature. Such matters, of no interest to the public at large, clog the daily calendars and delay action on and shorten the time for consideration upon matters of general interest and of more importance.

[1] *Governments and Parties in Continental Europe*, I, 210.

These measures are constantly passed for debate on the first call of the calendar, when reached are sometimes not debated, and when time is spent to the extent of half or three quarters of an hour by the proponent of the legislation, he is seldom able to muster enough votes for a roll-call to overturn the adverse report."

To meet the situation with a compromise that, while preserving the important part of the report system, should mitigate its hardships, recommendation was made that a committee might not report on a proposition to which it was unanimously opposed. It was submitted that "any measure which has not secured for itself a single supporter upon the committee before whom it is heard has slight, if any, chance of passing either branch of the Legislature; that it has little merit, and that it is not entitled to the right of limiting the opportunity to consider more important measures which have some chance of becoming law." In the session of 1914 there were 1431 matters reported on adversely by unanimous vote of committees. These were all read by the Clerks of both Houses, and appeared in the calendar of each. Some were kept in the calendars for a time by the process of "passing" for debate, and some were actually debated. Had the suggested rule been in force and had two minutes of time been saved on each measure — a very conservative estimate — the total saving would have been about sixteen legislative days, as reckoned on the normal number of minutes in such days. With other promising suggestions made at the same time, this one was shelved, but sooner or later something of the sort must be done, unless a still wiser remedy is found in preventing the trivial matters, mostly administrative detail, from ever reaching committees of the Legislature. Even then, permission to pigeonhole, where not a member of a committee favors, would be reasonable and useful. Indeed that would not be seriously dangerous if only one, two, or three members favor.

The Pennsylvania House looks in the same direction, but from a different angle, when requiring that if a committee reports adversely, the words "Negative Recommendation" are to be printed conspicuously on a line above the title of the bill. In both House and Senate such a bill is not to be placed on the calendar except by majority vote, and in the House a motion to place it on the calendar must be made within five days after the committee reports. This looks somewhat too drastic. If a committee is almost evenly divided, it seems unfair to compel a

debate on the floor over the question of consideration. Were it stipulated, however, that when two thirds of a committee are against a measure, it shall not go on the calendar without a vote, the rule might not be open to serious objection.

A committee of the Colorado House making an adverse report must, under the rule, "state explicitly their reasons therefor." Just what good this accomplishes does not suggest itself to one unfamiliar with its operation.

Certain Legislatures, where machine methods prevail, have what is sometimes popularly known as a "graveyard" committee, composed of carefully selected members who can be relied upon to bury effectually any undesirable measure referred to them. For the sake of appearances its official title is innocent enough. That in Pennsylvania, formally called "Judiciary Special," is familiarly styled "the Pickling Vat." It is said that in 1913 bills to the number of 137 that had passed the House were entombed in the graveyard committee of the Pennsylvania Senate. Of course theoretically such an institution is indefensible. In any case it is dangerous. Yet where leadership can be restrained within reasonable limits, a legislative burying-ground is not without beneficial uses.

A minor matter of detail connected with committee reports was brought to attention by the Massachusetts Special Committee on Legislative Procedure in 1915. The reading of these reports in House or Senate consumes uselessly much valuable time. Few members pay any attention, knowing the reports will all appear in the next day's printed calendar. So it was suggested that the reading be omitted. A few such time-saving changes, simple and reasonable, would in the aggregate have important effect in shortening sessions.

It is the custom in Massachusetts, and very likely common in the other States, for a committee report to be put in charge of some one member, who is expected to lead its defense on the floor. Usually the reports are so distributed among the members that each gets his fair share of opportunity and work. The chairman is likely to reserve to himself only the most important reports; if unused to debating, he may not make a single report. Lack of such freedom is one of the defects of congressional practice. To be sure, in the House the chairmen of the sub-committees of the Committee on Appropriations usually handle the appropriation bills for which they have been chiefly responsible,

and two or three of the other busy committees sometimes proceed in the same fashion, but the expectation seems to be that normally the floor work is the perquisite or responsibility of the chairman. Much of the harm from promoting to chairmanships by seniority could be avoided if chairmen conscious of their lack of skill in debate, or who are not at ease when on their feet, should feel free, without injury to pride or loss of prestige, to turn the floor work over to a junior member of the committee more expert in the science of parliamentary warfare. Many a man quite competent to guide the deliberations of a committee is not a born debater.

On the Continent of Europe it is common for Sections or Committees to elect Reporters, who take charge of the bills. In the Netherlands the Reporters of the various Sections form a committee, which in turn elects a general Reporter. They communicate to each other every question that has been discussed in the different Sections, and consider how they can best explain the principle of each bill, so as to frame their report accordingly. Should it appear that important points have been overlooked, the Sections may be reassembled to deliberate on them. The central committee of Reporters is also found in Belgium, Hungary, and Italy.

Opinion and practice in our legislative bodies differ over whether the minority of a committee has an inherent right to report. From one point of view the strict parliamentary law that gives no standing to the minority is logical enough, for it may be argued that just as a legislative body speaks when the majority speaks, so it should be with a committee. Yet there is the difference that the work of a Legislature is for the time being a finality, but the work of a committee is merely advisory and not binding. No good reason presents itself why a part of a committee, even though the lesser part, should not be heard, and the American practice in permitting it is quite defensible. With us the technical argument is rarely pressed, and the minority is usually without question allowed to print its view. In England the formal minority report as such is not recognized, but minority members secure at least publicity for their position by means of the standing order requiring every division in a select committee to be entered on its minutes, and any substitute that has been moved to be reported to the House with the names of those who voted for it.

Congressional committee reports are an agreeable novelty to a member fresh from a State Legislature where reports are of the "Yes" or "No" variety. When a committee of Congress recommends the passage of a bill, it describes briefly what is proposed. This explanation is printed and with a copy of the bill is at hand when discussion begins. The document conduces to a clearer understanding of the measure and to a more intelligent debate. State Legislatures might to much advantage copy the practice.

CHAPTER VIII

COMMITTEE FUNCTIONS

A LEGISLATIVE body may seek information for the purpose of making laws, or for the purpose of learning if laws are properly executed. These are really quite distinct purposes, though seldom discriminated. Strangely little discussion has been aroused by the common confusion of functions. Rarely is it asked how it happens that under a system supposed to emphasize the separation of powers, the legislative branch constantly asserts the right to supervise the executive branch. It seems to be accepted that this is a natural corollary of the duty to appropriate money, which is not lawmaking at all, but simply a supplying of means for the execution of law. The Constitution of Massachusetts, although distinctly saying that "the legislative department shall never exercise the executive and judicial powers, or either of them," also says that "the House of Representatives shall be the grand inquest of this Commonwealth." Another Constitution, that of Maryland, more specifically recognizes investigation as a proper legislative duty, for it prescribes the creation of a joint standing committee to examine and report upon all contracts made for printing, stationery, and purchases for the public offices and the library, and all expenditures therein, and also to examine and report upon all matters of alleged abuse in expenditures to which their attention may be called by resolution of either House.

Rule 23 of the Virginia House of Delegates goes farther with the principle than any other formulation of it that has come to my notice, not only bringing all the committees within its application, but also imposing on them the duty of exercising initiative. "The several standing committees," it is directed, "shall not only consider and report upon the matters specially referred to them, but shall, whenever practicable, suggest such legislation as will provide upon general principles for all similar cases. And it shall be the duty of each committee to inquire into the condition and administration of the laws relating to the subjects which they have in charge; to investigate the conduct and look to the responsibility of all public officers and agents con-

cerned; and to suggest such measures as will correct abuses, protect the public interests, and promote the public welfare."

Senate committees in the State of Washington may infer much the same duty from the rule requiring that they "shall acquaint themselves with the interest of the State specially represented by the committee, and from time to time present such bills and reports as in their judgment will advance the interests and promote the welfare of the people of the State."

Congress has a large group of committees supposed to investigate the expenditures in the Departments. That they rarely do anything does not confound the theory of their powers. They could if they would. Congress established its right to compel information about the administration of law long before that of compelling information to aid in the making of law. It is a curious instance of how our fathers sometimes put the cart before the horse. When investigating in 1792 the defeat of General St. Clair, a committee compelled witnesses to attend, and to testify under oath, but not until 1827, and then only after extended debate, was it determined that a committee engaged in real lawmaking might send for persons and papers. The tariff was the subject in hand, the Committee on Manufactures seeking the right to summon witnesses, and as the vote stood 102 to 88, it may be seen that a substantial minority questioned the power of Congress to enlighten itself by such methods if nothing more important than the framing of law was at stake.

Not unnaturally, however, legislative power in this particular has been chiefly exercised in the way of "investigation" — a word that has come to imply a procedure half judicial, used mainly to learn if laws have been broken or badly administered. Inquiry of this sort is more likely to meet reluctant witnesses than inquiry into the need for law. The few volunteer truth where the many volunteer wisdom.

The power to summon witnesses appears long to have been deemed too serious a matter for general delegation, and it became the custom of Parliament to act by separate order in each instance of need. Witnesses were not to be produced save where the House had previously ordered an inquiry, nor then were orders for their attendance to be given blank. Congress followed this example, and even now, though the rules give certain committees the authority to investigate without securing special permission, additional authority must be obtained before the

presence of witnesses can be compelled. It has become, however, the custom to make the authority comprehensive and plenary in the case of any committee to which it is delegated.

Ten of the States have deemed it expedient to put into their Constitutions provisions under which their Legislatures may secure the attendance of witnesses, and several of the ten specify that the power may be exercised by committees. In Mississippi "orders, votes, and resolutions of both Houses, affecting the prerogatives and duties thereof, or relating to adjournment, to amendments of the Constitution, to the investigation of public officers, and the like, shall not require the signature of the Governor; and such resolutions, orders, and votes, may empower legislative committees to administer oaths, to send for persons and papers, and generally make legislative investigations effective." The inference would be that a committee does not have the authority unless specifically authorized, and indeed it might also be argued on the strength of the doctrine, *expressio unius est exclusio alterius*, that where the powers are granted to the Houses without reference to committees, the Houses only can exercise them.

Various States having no constitutional provision on the subject attend to it by statute. Thus in Massachusetts the power to summon is to be inferred from the statute saying that "a person shall not be excused from attending and testifying before either branch of the General Court or before a committee thereof upon a subject referred to such committee on the ground that his testimony or evidence, documentary or otherwise, may tend to criminate him or subject him to a penalty or forfeiture." It is also provided by statute that "Senators and Representatives, acting as members of a committee of the General Court, may administer oaths to persons examined before the committee." These powers are in harmony with the spirit of the constitutional provision that "the Senate and House of Representatives may try and determine all cases where their rights and privileges are concerned, and which, by the Constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may respectively think best." That much survives of the original system whereunder the General Court was a trial court for all sorts of causes. Although the provision now does not go beyond rights and privileges, the spirit of the old practice is found in the conception that prevails of

the general powers and duties of all kinds of legislative committees.

In 1866 a New York court had occasion to set forth the theory in the case of Wilckens *v.* Willett, 4 Abb. App. Dec. 596. The power to subpœna witnesses, it said, is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious, and wholesome legislation. "The power is rather judicial in its nature, but in a legislative body exists as an auxiliary to the legislative power only. In the early history of the country from which our institutions both of law and legislation are principally derived, the judicial and legislative functions existed in and were exercised by the same body. And when they were afterward separated, and each came to be exercised by a supreme tribunal or body, the legislative authority necessarily retained a sufficient amount of the judicial power to enable it to investigate fully and to comprehend thoroughly any and every subject upon which the body proposed to act in its legislative capacity. This included the power to subpœna witnesses to give evidence, to compel them to attend and testify, and to punish for disobedience and contempt in refusing to attend, or in refusing to testify upon attendance."

Nevertheless there are limits to the power. They were defined by an Ohio court in *Ex parte* Dalton, 43 Ohio St. 142. "An investigation for the mere sake of investigation," it was declared, "or for political purposes not connected with intended legislation or with any matters upon which the House could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersion, where the Legislature had no power to put him or it on trial for supposed offenses, and no legislation was contemplated, but the proceeding must necessarily end with the investigation, will not in our judgment be a legislative proceeding, or give to either House jurisdiction to compel the attendance of witnesses or punish them for refusal to attend."

Sundry thoughtful observers have found grave danger in the abuse of the inquisitorial power by legislative bodies. For instance, John Ordronaux[1] has pointed out how natural is the disposition to enter into the domain of private life and personal affairs, whenever legislative committees are given the power to

[1] *Constitutional Legislation in the U.S.*, 374–75.

send for persons and papers, indiscriminately, at their own discretion. It is too often the case, he says, that, for the purpose of gratifying personal animosities, or of casting reflection upon an opposite administration, excuses are invented to justify the examination of immaterial witnesses by a forced construction put upon the value of their testimony. This opens the door to an indefinite search after evidence, and converts the proceeding into a fishing excursion to discover facts incriminating persons. This examination may begin with inquiries involving the manner, or method, in which political duties have been discharged by public officers, and be continued until it enters the domain of their private affairs and domestic life. And what it may fail to extort from them, it may supplement by information similarly obtained from other witnesses, who likewise stand unprotected against irrelevant, immaterial, or impertinent questions. Such an exercise as that of judicial functions would practically establish a tribunal of inquisition into the private life of any citizen, at the will of a legislative committee armed with the omnipotence of a subpœna. It is hardly necessary to say that this is not one of the legitimate purposes of legislation.

By reason of these conditions it is urged that investigating committees should be attended by counsel, to represent them in the examination of witnesses; and that if any person examined wishes like aid, he should have it, even though the proceeding is not technically a trial. Congressional investigating committees have usually admitted counsel, sometimes even to assist a witness, but it is a matter of privilege and not of right. Another remedy for the abuse of inquisitorial power, advised by Frederick W. Whitredge in concluding a study of "Legislative Inquests,"[1] is the enactment of a statute defining and regulating as far as possible, all the questions that arise in connection with the exercise of the power; affirming, if need be, the necessity and existence of the power, but providing among other things: (1) that neither House of the Legislature shall investigate the administrative conduct of an office, the head of which it has no power to remove; (2) that there shall be no punishment for contempt except in case of refusal to be examined, or to answer a question which might have been asked in a court of law.

More important than the detail of the investigation process is the basic principle. We have not yet devised a satisfactory way

[1] *Political Science Quarterly*, I, 1 (March, 1886).

of watching, studying, correcting, and perfecting our administrative departments. In essence it is not legislative work, unless it can be successfully argued that the making and changing of administrative rules and regulations is legitimate lawmaking, a contention that ought to be stoutly denied. A score of reasons could be advanced to show that it is work for which legislative committees are unfit. The fact that they are sure to act in a hostile spirit is enough by itself to condemn the method. The solution of the problem may be left for some student of administration to suggest. Here it is unnecessary to go farther than to express the belief that it will not be found in any development of the legislative branch of government.

Information

Securing information on which to base appropriations is a different matter. To be sure, appropriating is not lawmaking, but it has from the start been a function of lawmaking bodies, indeed was originally the only work of what became lawmaking bodies, and is to this day the chief work of the chief lawmaking bodies — Parliament and Congress. With the growth of business, it becomes more and more apparent that committees sitting during the session have not the time, and do not work under the conditions necessary, for getting the information that ought to be had in order to make appropriations satisfactorily.

Remedy may be sought in one of two directions. Either the collecting of information can be entrusted to some outside agency, as is contemplated by most of the budget systems; or a legislative committee may be empowered to do the work while the legislative body itself is not in session. The budget program enacted in New York in 1916 empowered the Senate Committee on Finance and the Assembly Committee on Ways and Means to continue during the recess, with authority to gather by subcommittees information as to the needs of the various institutions, boards, bureaus, commissions, etc. In Missouri it is customary for the Governor to appoint, about thirty days before the Legislature convenes, a committee composed of one Senator and two Representatives, who must visit the State institutions and report upon their legislative needs and prepare a tentative budget for legislative consideration. The auditing committee meets at the State capitol to audit the books, vouchers, and accounts of the various departments, and submits its report to the State

Legislature. This auditing committee is, as a rule, composed of the leading members of the House and it is customary for all the members of this committee to be appointed on the appropriation committee.[1]

In Virginia of late the Senate Finance Committee has been convened thirty days before the meeting of the Legislature, to receive reports from the State institutions as to their requirements, but that can be done only between the two biennial sessions of the four-year term for which the Senate is elected.[2] This suggests the difficulties in the way of adopting what would otherwise be a simple expedient. With very little of practical advantage we adhere to the ancient notion that Legislatures are entities, to be sharply delimited, and not to be treated as continuing bodies. Where Senatorial terms overlap, we usually permit the terms of the lower House to govern, and maintain the fiction that whenever the lower House dies, the upper House dies. Therefore technical objections crop up whenever it is proposed to carry along the work by bridging over the terms. There are also some real difficulties, and chief among them the uncertainties of reëlection. It may happen that none or but few of the members selected at one session to do certain work before the next will return.

Nevertheless recess committees have been used almost if not quite from the beginning of legislative assemblies in this country. Here is a typical vote of the Massachusetts General Court, October 2, 1645: "Left. Tory, Left. Athirton, & Stephen Kingsly are appointed by this Courte to view ye neerest way between Dorchester & Weimouth, & to retourne their thoughts to ye next sitting of ye Generall Courte." [3] In those days the matter of reëlection was not allowed to bother, for the recess committees were as likely as not to contain men who were not members at all, being in fact more in the nature of commissions than what we now call committees.

Massachusetts has until recently made much use of recess committees for all sorts of purposes. Their value has been a matter of much argument. Customarily those who served on them were paid the amount of the legislative salary, which made them keenly sought by men to whom the pay was the chief object; the

[1] S. Gale Lowrie, *The Budget*, Wis. St. Bd. of Public Affairs, 1912, p. 217.
[2] *Ibid.*, 247.
[3] *Records of the Colony of the Mass. Bay in N.E.*, III, 46.

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cynic says these are the least desirable men for such service. A favorite expedient of the impecunious lawmaker was to suggest the need of a recess committee for this or that object, and then if the suggestion met with favor, to devote all his energies to the task of persuading the Speaker to appoint him on the committee. At times this developed lamentable log-rolling. It chanced that all the evils of the practice were brought sharply to public attention by the circumstances connected with the appointment of several recess committees at the close of the session of 1918. The Constitutional Convention met for its second session before the criticisms had died out. Summary and rather ill-considered action followed. Instead of leaving the Legislature to preserve the benefits and yet cure the evils, as it probably would have done, the Convention decided to apply the drastic remedy of forbidding any payment to recess committees. The amendment to this effect, a minor matter beneath popular interest and in all its bearings beyond popular comprehension, was adopted at the polls in the general sweep of the affirmative vote for a large number of amendments. Thus virtually ended any considerable use of recess committees in Massachusetts.

It generally happens that some members of a recess committee turn out to be nothing but passengers, letting the rest do all the real work, but this is true of most committees and an evil apparently inseparable from the committee system. More serious is the damage caused by the failure of some members to get reelected, in which case there may be no strong men to champion the committee report in both House and Senate. Furthermore, Legislatures like individuals are fallible to the extent of looking with some scorn on their predecessors, and as the report of a recess committee is viewed in the light of an inherited burden, its reception is not of the most auspicious variety.

For these reasons it is often questioned whether the cost of a recess committee, usually ten or fifteen thousand dollars, is worth while. Yet my own judgment inclines toward its use, within reason. Certain intricate and serious problems cannot be rightly handled by any legislative committee in the course of the session. Adequate research is impossible when coming on top of other legislative duties. Well-deliberated judgment is difficult. Recess work does result in compiling a mass of pertinent information that may usefully be put in pamphlet shape, even if no legislation immediately results. Sooner or later if there ought to be

action, it will come, and it will be the more intelligent because of the study performed.

Thomas H. Benton, after watching the recess committees of Congress for thirty years, strongly disapproved them. He held that no warrant could be found in the Constitution for this elongation of itself by the House by means of its committees; and that it was inconsistent with the adjournment for which the Constitution provides, and with those immunities to members that are limited to the term of service, and to the time allowed for traveling to and from Congress. He thought each case of appointment of a recess committee by the Senate had become a standing argument against their existence.[1]

It will be seen that the objections Benton raised were mainly technical and do not go to the heart of the problem. Yet they bring up certain legal considerations that may not be ignored. Several of the State courts have had occasion to confront these. In 1853 a Maryland court held in Marshall *v.* Howard, 7 Md. 466, that "committees have no power to act as such during the recess of the Legislature, unless they are authorized specially so to do." The same principle was laid down eight years later in Indiana. On the outbreak of the Civil War, the Indiana Legislature appropriated a million dollars by reason of the expenses entailed, and appointed an auditing committee with power to sit during the recess, to audit the expenditure of the money. The Auditor of the State refused to pay the members of this committee their wages, partly on the ground that members of the General Assembly could not exercise any legislative function when the Assembly had, by adjournment, ceased to exist as a constituted and authorized body. The court said it seemed to be a rule of parliamentary law that a legislative committee could not regularly sit in a vacation of the sitting of the legislative body. This is the rule, it said, "we take it, where the Legislature has specially prescribed none upon the subject; but to say that the Legislature has not power to authorize a committee to sit in vacation, is a proposition which the practice of the Legislature of this State, and of Congress, as well, we think, as the dictates of correct reason, contradicts." [2]

In Tipton *v.* Parker, 71 Ark. 193 (1903), it was held that neither House had the authority to appoint a committee to make

[1] *Thirty Years' View*, II, 305.

[2] Branham *v.* Lange, 16 Ind. 497, Perkins, J. (1861).

any investigation after the final adjournment of the Legislature. In Fergus *v.* Russell, 270 Ill. 304, 345 (1915), the court said it saw no reason why the holding in the Arkansas case should not apply to a joint resolution appointing such committee, and it declared invalid certain appropriations for expenses of committees appointed to sit after final adjournment. It met State *v.* Frear, 138 Wis. 173, by saying the Wisconsin court did not state whether the committee was to sit during or after the session. It met Branham *v.* Lange, quoted above, by saying the committee there had been appointed by an act regularly passed and not by resolution. It met *In re* Davis, 58 Kan. 368, by saying that though the Kansas court does hold that the Legislature has the power to confer authority on a committee to continue its labors after final adjournment, the Illinois court did not agree with that conclusion. Furthermore, it refused to admit that long indulgence in the custom could create a right in the Legislature or either House to do that which it has no power or authority to do.

In the Kansas case, the opinion, given in 1897, said — "but that the Houses of the Legislature have power to confer authority on a committee to continue its labors after adjournment is not questioned." The power there was given by concurrent resolution.

The State Constitutions have been remarkably silent in this matter. It is one of the very few phases of governmental activity that their reformers have almost wholly overlooked. The only recess authority that comes to my notice is the permission given in Virginia to the auditing committee, composed of two Senators and three Representatives, to sit during the recess. The Constitution of Mexico, more honored in the breach than the observance, provides for a recess committee of Congress, made up of fourteen Senators and fifteen Deputies, which among other duties has this: "To report upon all matters which may not have been acted upon, in order that the next legislature may immediately take them up as unfinished business." The Guatemala Assembly elects a committee of seven for a like purpose. The idea is not wholly undeserving of reflection by those who would improve our State legislative processes.

Commissions are in some ways preferable to recess committees for compiling information and maturing advice. Their great advantage is that where custom permits, they can be made up of experts. Also they may contain men with varying points of view,

avoiding merely partisan differences, but securing genuine advantages that come from having a matter considered by picked men fairly representing various elements in the community. Furthermore they can take all the time necessary for getting at the facts. Few men realize how often an accurate determination of the facts will change preconceived notions. Edwin Chadwick, a wise British legislator who served on more than twenty commissions, makes the astounding statement that he never knew an investigation "which did not reverse every main principle, and almost every assumed elementary fact, on which the general public, parliamentary committees, politicians of high standing and often the commissioners themselves, were prepared to base legislation."[1] Even though this may have been somewhat overdrawn, yet anybody familiar with the reports of commissions knows that they refute a large part of the hazy, uncertain impressions we all get from casual reading and chance observation.

In practice it is found that the chief objection to the use of commissions lies in the fact that they have no spokesman, no personally interested and immediately informed champion, in the body to which they report. This, however, must be the case with all information and advice coming from outside. It is an objection easily met by the appointment of hybrid commissions — made up partly of members of the legislative body, partly of outside experts. Such commissions ought to be all the more effective if they contain representatives of the administrative departments concerned with the topic under consideration. Thus the Insurance Commissioner ought to be on any commission studying a matter relating to insurance, or the Bank Commissioner in case of a financial problem. That not only should bring to the inquiry the benefit of practical experience, but also should remove occasion for jealousy or any other of the causes that lead to friction and delay results.

Recent English Development

Comparison of the modern history of committees in England and the United States throws a clear light on the fundamental problems involved. In each country it has been found absolutely impossible for the lawmaking body itself, acting as a whole, to do the preliminary and subsidiary work. This self-evident situa-

[1] *The Health of Nations*, I, 127, quoted by J. P. Dunn, "The Proposed Constitution of Indiana," *Proceedings*, Am. Pol. Sci. Assn. 1911, p. 47.

tion would not call for so much as statement were it not constantly ignored by critics. They will never reach straight thinking on the subject until they recognize that much of the work must be done outside the legislative chamber, simply because the hands of the clock compel.

There is no difference in principle between the two countries in the handling of private and local bills. Each invariably uses small committees, and whether they are called standing or select or special, and whether they are created to handle one matter or a group of kindred matters, does not affect the spirit of the process.

Difference comes in the matter of public bills — questions of policy affecting the general welfare. It is only in comparatively rare cases that in Parliament these are sent to a small select committee, the reason for then adopting such a course usually being that it is desired to summon witnesses and take evidence as to the expediency and effect of the provisions of the bill. Committees of this kind generally make special reports, stating their reasons and conclusions, but bills considered by them have to be considered subsequently by a Committee of the Whole House.[1] Ordinarily public bills do not go to small committees.

The English development in this particular has been dominated by the consideration that the Cabinet is responsible for whatever results. In any matter of consequence it would never do to let a committee report something contrary to the views of the Government. This it is that has kept Parliament from creating small, permanent committees of the American type. It would be impossible to exercise over them that centralized authority which is the essence of the British system. To be sure, the American party system contemplates some degree of authority and responsibility, but it does not approach the centralized power of the British Cabinet. And precisely herein lies the grievance of those Americans who prefer the English system. It is at the heart of the criticisms that Woodrow Wilson and his academic followers have been visiting on the American committee system for thirty years.

Whether an elective autocracy is or is not better than scattered responsibility, the fact is that under an elective autocracy the work of the lawmaking body must be controlled. Yet when that work grows beyond the point where it can be done by the

[1] Sir C. P. Ilbert, *Parliament*, 73.

body sitting as a whole, subdivision becomes imperative. Forward-looking men often foresee situations like this many years before action can no longer be avoided. Such a man was Sir Thomas Erskine May, the great authority on matters parliamentary. In an article in the "Edinburgh Review" for January, 1854, he suggested that the House might be divided for legislative purposes into six Grand Committees, somewhat after the fashion of the Bureaux or Sections that had been devised on the Continent. A month later, though, when he came before a select committee he went no farther than suggesting that the House sitting as a Committee of the Whole, but with a smaller quorum, might sit on two mornings of each week for considering public bills.

Nothing came of the discussion for a quarter of a century. At the end of that time Sir Erskine inclined to something between a Committee of the Whole and a select committee, suggesting that committees on public bills should be specially constituted and have permanent functions not limited to a single bill. This was the line of development that Mr. Gladstone followed in 1882, when at his instance a standing committee on Trade and one on Law were set up. These were but experimental and were dropped in the following year. In 1888 they were revived and they seem now to have become an established feature of the English parliamentary machine.

At first to the Law Committee were referred bills relating to law, courts of justice, and legal procedure; to the Committee on Trade, bills relating to trade, agriculture, fishing, shipping, and manufactures. Each consisted of not less than sixty nor more than eighty members, usually sixty-seven, one tenth the House membership, a figure facilitating choice. They were nominated by a special committee of the House, known as the Committee of Selection. This committee was empowered to add not more than fifteen members in the case of any particular bill. The quorum was twenty. Chairmen were to be named in a roundabout fashion. The Committee of Selection was to name a chairman's panel, consisting of not less than four nor more than six members, this panel to appoint the chairmen from among themselves, with power to change their appointments.

In 1907 the two committees were replaced by four. One of these was in effect the former Scotch committee, having to do with bills relating to Scotland; the other three were to consider

any bills that might be referred to them, and not as theretofore only those relating to law or trade. All bills, except money bills and bills for confirming provisional orders, were to be referred to one of the standing committees, unless the House otherwise ordered on a motion to be decided without amendment or debate; and the bills were to be distributed among the committees by the Speaker. Lowell says that the object of the change was to give a better chance of enactment for measures which there is not time to debate in Committee of the Whole; and the provision that the House might vote not to send a bill to a standing committee was designed chiefly for the great party measures of the Government which must always be debated in the House itself.[1]

The thoughtful statesmen who addressed the Select Committee on House of Commons Procedure in 1914 made important suggestions for the improvement and development of the system, but the outbreak of the World War swept aside such matters and not until after the armistice ended the war did they come to the front again. Soon after the opening of the session of 1919 the Attorney-General, Sir G. Hewart, speaking for the Government, proposed changes that as a Government program were of course made. Among them was an increase in the number of standing committees from four to six — one for Scotch and the rest for general matters. The permanent membership of each, instead of ranging from sixty to eighty, was thereafter to range from forty to sixty. Previously in the case of each bill referred, the Committee on Selection had added fifteen "specialists" — members especially qualified to consider that particular subject. The new arrangement gave some leeway in designation, ranging from ten to fifteen.

It will be observed that by itself the size of these committees differentiates them from anything familiar in the United States. Indeed, although they are called "standing committees," their only resemblance to the committees thus known to Americans lies in their permanence. They were created to do precisely the same work as the Committee of the Whole, and were assimilated to it as nearly as might be. They are to collect no evidence, hear no witnesses, report no opinions, but simply to discuss the proposal and then report it, with or without amendments. J. Ramsay Macdonald expressed the general idea of the purpose when he told the Select Committee in 1914 that he wanted large com-

[1] *The Government of England*, I, 273.

mittees, first, that they might be thoroughly representative, a kind of microcosmos of the whole House, and secondly, that they might deliberate on precisely the same scale and with the same scope of mind as the whole House itself. Said Mr. Balfour: "I do not wish our committees to be composed, especially Grand Committees, of experts or people who are supposed to have special knowledge of the subject. I rather want to have the reflected common sense of the House." To this end the membership is planned to represent all the parties in proportion to their share of the House itself. Save in the case of the committee having to do with Scotch matters (which must include all members representing Scotch constituencies), care is taken to have the English, Scotch, Welsh, and Irish groups proportionately represented. The conduct of the committee sittings reflects that of the House. There are the same benches facing each other. The minister in charge of the bill chancing to be under consideration sits in the corner seat at the right of the Chairman, and on behalf of the Government accepts or refuses to accept amendments. In case of divisions the whips of each party send for absent members.

At first the reference of a bill to one of these committees was made on motion, and the motion might be considered at any stage, even after the bill had been partly considered in Committee of the Whole House. At the end of the session of 1905 the chairmen's panel in a special report expressed the opinion that it was not desirable thus to refer bills arousing strong party or political controversy, or exciting acute religious susceptibilities, nor should bills be referred save by a substantial majority of the House. This, however, was not the line that development took, for in 1907 the system was changed so that bills, with the exception of those for imposing taxes, of consolidated fund and appropriation bills, and of bills for confirming provisional orders, shall after second reading stand committed unless the House, on motion to be decided without amendment or debate, otherwise order. Sir Courtenay Ilbert says this was on the view that when the general principle of a bill has been confirmed on its second reading, a reasonable chance ought to be afforded of having its provisions discussed, that this chance is improved by sending a bill to standing committee, that, as a general rule, discussion in a standing committee is more business-like and effective than discussion in a Committee of the Whole House, and that the

time of the House is saved by dividing the House into compartments for discussing the details of legislative measures.[1] Thus reference to a standing committee is made the normal, instead of the exceptional, practice. This was confirmed and strengthened by the Government program of 1919.

At first it was contemplated that these committees should stand on all fours with a Committee of the Whole House in the matter of amendments. If a Committee of the Whole does not amend, there is in Parliament no report stage where amendments can be offered. It was charged that with a like condition in mind, standing committees would sometimes refrain from amending in matters of detail, so as to avoid exposing the measure to important amendments on a report stage, as would follow if any changes at all were made. This led in 1901 to a provision requiring a report stage on all reports from standing committees, whether embodying amendments or not.

It was expected that much time would be saved by instituting these committees, but no great gain followed. Yet the saving has not been negligible. In the seven years from 1907 to 1913 inclusive, 178 bills were handled in this way. It was found that measures had a better chance of success if referred to a standing committee. This was particularly the case in respect of bills brought in by private members, for while scarcely one tenth of all such bills become law, more than half of those fortunate enough to reach a standing committee were enacted.[2] Little relief, however, came in the matter of measures arousing keen controversy. At first it was understood these should not go to standing committees, and though presently this was somewhat disregarded, the result was the provoking of long debates and of divisions on the report stage. Opposition was always raised when it was proposed to send one of the more important measures to a standing committee, the argument being that every member ought to have the chance to take part in the discussion of the details of such measures.

Another weakness showed itself through a gradual decrease of attendance at committee meetings. On the face this might seem an indication of waning interest and confidence, but judging from the testimony in 1914 and the action in 1919 those best

[1] Sir Courtenay Ilbert, supp. chap. to Josef Redlich's *Procedure of the House of Commons*, 208 *et sqq.*

[2] A. L. Lowell, *The Government of England*, I, 271.

qualified to draw conclusion attributed the reason to the tax on the time of the members, due to the requirement that these committees should not sit while the House was in session. The ancient practice of Parliament was to meet at eight o'clock in the morning and sit until noon, "so that the Committees on whom the greatest business depended might have the afternoon for their preparation and dispatch." When the day had been turned upside down and the House had come to do its work in the afternoon and evening, it was hardly to be expected that members would cheerfully give the mornings also to parliamentary duties. As a remedy for the situation Lord Hugh Cecil proposed to the Select Committee in 1914 and repeated on the floor in 1919 the proposal that the House should not sit as such after Questions on Tuesdays and Wednesdays, but leave the rest of those days available for committee meetings. Speaker Lowther in 1914 feared that if the House should not sit on one or two days a week in order that committees might sit, the members would take a holiday. Apparently, however, that danger has not been found serious in France, where the Chamber does not sit on Wednesdays, leaving that day for committee work, committees hardly ever sitting more than once a week. Probably imitation of the French practice would have been found wiser than the decision reached in Parliament, in 1919, that committees might sit at pleasure, whether while the House was sitting or not, for this in turn produced the unfortunate effect of sadly reducing attendance in the House and it was said the discussion of constitutional questions of the utmost importance was regularly conducted before empty benches. Members complained of being expected to be in several places at the same time.

One of the merits said to inhere in the English system is that the vote likely to decide the fate of a measure is taken by those who have heard the debate. Any one familiar with the workings of the system prevailing in Congress will appreciate the importance of this. The quorum and roll-call requirements in Washington produce a lamentably large number of decisions really determined by men who have not heard the arguments, if indeed they know precisely what the issue may be.

Another gain is that in the English committees party lines are much more loosely drawn than in the House itself. At any rate, this was said to be the case while the committees handled only the

less important matters. What may have been the effect of sending to them larger measures, under the very recent extension of the system to the point of sending even money bills to standing committees, has not come to my knowledge. Naturally, however, committees incline to forget political differences, and if such a tendency can be fostered by the groupings with which Parliament is experimenting, that alone will be a gain worth while. It would be fortunate if such a result could somehow be achieved in every legislative body where partisanship runs high. A few big questions of policy may very well be decided by party votes, but it is a great pity to have such votes customary on technical matters or those relating to the routine of government.

The idea contained in this recent English development might solve some of the difficulties besetting Congress and such of our Legislatures as are overburdened with work. If it is permitted to a hundred members of a House to do business as a Committee of the Whole, why not let another hundred also do business, sitting somewhere else? Why not divide the House into three or four sections, sitting separately for the handling of the less important business? In principle we apply precisely that idea with the quorum. We say that a major fraction of the House may work. We let a minor fraction work as a Committee of the Whole. Why not several minor fractions?

Probably for the purposes of Congress it would not be best to imitate France and her neighbors in making ten or a dozen subdivisions. If we did that, the chances are that when the committee reported to the House, there would be a second debate covering the ground as exhaustively as the first, for men would not be content to ratify speedily the recommendation of only the greater part of forty members, or thereabouts. But if in Congress the first decision were reached by a majority of the same number that can now decide in a Committee of the Whole, a hundred, ordinarily the decision would stand. It turns out in practice that party proportions are very nearly the same whether attendance be large or small, and the same is true as to the proportions of leaders and followers. So familiar and well accepted is this, that unless somebody raises a point of order that no quorum is present, work goes along, though but a few score of members are in attendance. Applying the actual and common practice more systematically, it might be possible for our lawmaking assemblies to cover, with

just as much safety, very much more ground than they cover now, and so meet the insistent demand for less delay and greater achievement.

In Canada

The Canadian committee system appears to stand midway the systems of England and the United States, using both large and small standing committees. In 1921 the House of Commons had thirteen of them, ranging in size from thirteen (on Official Report of Debates) to 127 (on Railways, Canals, and Telegraph Lines). The other large committees with more than thirty members were those on Agriculture and Colonization, 105 members; on Banking and Commerce, 81; on Miscellaneous Private Bills and on Public Accounts, each 61; on Mines and Minerals, 37; on Marine and Fisheries, 36; on Forests, Waterways, and Waterpowers, 34; and on Standing Orders, 33. The Senate had seventeen committees, with membership running from seven to forty-eight, five having more than twenty members.

As the House had but 234 members and the Senate 88, it will be seen that the Canadians apply the principle of the original English Grand Committees in handling much of their business. Thus in each branch the largest committee — in the House, Railways, Canals, and Telegraph Lines, in the Senate, Railways, Telegraphs, and Harbors — had more than half the membership of the body itself. With 262 committee places in the Senate and 680 in the House, each branch averaged about three to a member — an allotment too large for the best work. In addition the Senate had seven and the House six special committees in the course of the session, most of them dealing with subjects of much importance, such as the Civil Service Act, the Copyright Act, Opium and Narcotic Drugs, Unemployment. Special committees of the Commons, unless otherwise voted, are not to have more than fifteen members.

The quorum requirements for the large Canadian committees suggest that in point of attendance the system has met with the same difficulties as in England. Of the 127 House members on Railways, Canals, and Telegraph Lines, twenty-five can proceed with business. There is even less of solicitude for the interests of the farmers, if inference is to be drawn from the fact that twelve out of the 105 members of the committee on Agriculture and Colonization suffice for hearing and voting. On the other hand of

the eighty-one men concerned with Banking and Commerce, twenty-one must be in attendance.

Criticisms of the American System

It will be seen that in weighing the comparative merits of the English and American systems, we are to determine whether it is better to have the preliminary investigation and the discussion of minute detail conducted by the whole House or a sizable fraction thereof, or by small groups to each of which is entrusted all measures relating to one field of governmental activity.

In criticism of small groups, American committees, it is averred that, like all other small and secret bodies, they tend to intrigue; that they furnish facility for the exercise of underhanded or corrupt influences; that they are the easy prey of the lobbyist. It is charged that though semi-judicial in their nature, they rarely give both sides of a question equal opportunity for presentation; and that the advantage lies with the side supported by able counsel, skilled in argument and accustomed to the conditions of committee hearings. Furthermore, it is argued that small groups are peculiarly exposed to the temptation to compromise matters of principle, as well as to sacrifice broad policies to personal feeling or selfish interest. These are charges that can be brought with more or less force against many kinds of small working groups, and the answer is that though the evils do exist, they are found relatively unimportant in the activities of boards of directors, trustees, commissioners, and the like, which for generations have been justified by their fruits, and have become customary organs of joint effort.

More unusual are the conditions found in the make-up of legislative committees. Unlike working groups in other fields, fitness and capacity are not the predominating tests for their selection. Every member of a Legislature or Congress must by custom have at least one committee position; often he gets two or three positions, sometimes several, or, indeed, in the case of Senators, they might be called many. It is generally felt that on every committee there ought to be at least a few men of recognized capacity, for bills are to be assigned by classes of topics, making it impossible to concentrate all the important questions, and in advance there is no certainty that any single committee in the whole list will have nothing but unimportant work. As the strong men in any legislative body make up only from one fifth to one tenth of

its membership, in practice the result is that they are scattered through the committees, and the chances are that the majority of each committee will be made up of men without experience or without marked capacity. This is said to dissipate ability, where instead ability ought to be concentrated on the really important problems.

This criticism is weighty. It can be met only by pointing out that it applies to all representative bodies gathered as a result of popular suffrage, and that the situation is saved by the familiar workings of leadership, whereunder the few of greater ability guide the many of lesser ability. Legislatures might or might not be more effective if they were composed only of the strong few. The American theory has been that democracy is safer, if not wiser, when it is guided by the many.

Another result of what may be called topical committees is that the interest and activity of each legislator is for the most part restricted to the topics dealt with by the committees to which he is assigned. Only as a witness can he share in the work of any other committee. Assuredly this has its unfortunate side. On the other hand, there are few men so gifted that they can do many things well, and on the whole it may be advantageous to secure concentration of legislative study. The man who wants a finger in every pie is apt to be a rather useless sort of man, of the busybody variety. Now and then a legislator may well chafe because he cannot share actively in more matters than his committee assignments bring to him; he may be justified in feeling that he could really help in the work of this or that other committee. Individual hardships no doubt follow. Yet there is usually work enough to go round, and the man willing to apply himself to whatever comes to his lot need rarely be idle.

Undoubtedly the system throws much power into the hands of chairmen, but where is the harm? Somebody must lead. If it is not the strong, it will be the weak. If it is not the experienced, it will be the inexperienced. Otherwise chaos. But, it is said, this is leadership without responsibility. The objection is fanciful. It carries the demand for responsibility to an absurd extreme.

Next consider the allegation that most of the laws are really made by committees — that we are ruled by "little legislatures." This is a phase of the subject to which much attention has been given by those writers who state a simple fact with a context im-

plying that it is necessarily reprehensible. As an example, take Francis E. Leupp's description of a familiar scene at Washington, the same sort of a scene that is to be observed on a smaller scale in every Legislature of the land. "Perhaps the most cheerful pleasantry ever perpetrated by Congress," he says, "is the bit of comedy enacted in the Senate nearly every day when the Clerk's desk is heaped with bills for private pensions and relief. It may be that only one Senator is in his seat, and he reading or writing. One by one the bills are called by title, the presiding officer reciting the usual formula: 'The question is, Shall the bill pass? Those in favor will say "Aye"; those opposed, "No." The ayes have it and the bill is passed.' Not another voice is heard, and millions of the people's money is voted away at a sitting without the sound of an 'Aye' or a 'No' — the bills floating through on nothing but the silence which is assumed to give consent." [1]

This breathes the notion that the practice must be evil. The same impression can be produced by a statement of fact without any comment at all. Thus Professor Reinsch says in a footnote: "On one day in January, 1905, 459 bills were passed in eighteen minutes. In 1899, the river and harbor bill carrying appropriations amounting to thirty millions was passed after a debate of ninety minutes." [2] Here the very absence of explanation permits the reader to draw an unfavorable conclusion because on their face the facts suggest nothing else. Even so candid a man as President Cleveland described the practice in a way to give the impression that there is but one side to the question. It was in a message vetoing the Elizabeth S. DeKrafft pension bill, June 21, 1886, that he said: "In speaking of the promiscuous and ill-advised grants of pensions which have lately been presented to me for approval, I have spoken of their 'apparent congressional sanction' in recognition of the fact that a large proportion of these bills have never been submitted to a majority of either branch of Congress, but are the results of nominal sessions held for the express purpose of their consideration and attended by a small minority of the respective Houses of the legislative branch of government."

In the previous year Woodrow Wilson, who was destined

[1] Francis E. Leupp, "Some More Humors of Congress," *Century Magazine*, April, 1903.

[2] *American Legislatures*, 69.

to be a successor of Mr. Cleveland, had published his book on "Congressional Government," with strictures on the same point. Said he: "The House never accepts the proposals of the Committee on Ways and Means, or of the Committee on Appropriations, without due deliberation; but it allows almost all of its other Standing Committees virtually to legislate for it. In form, the Committees only digest the various matter introduced by individual members, and prepare it, with care, and after thorough investigation, for the final consideration and action of the House; but, in reality, they dictate the course to be taken, prescribing the decisions of the House not only, but measuring out, according to their own wills, its opportunities for debate and deliberation as well. The House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible. It legislates in its committee-rooms; not by the determination of majorities, but by the resolutions of specially-commissioned minorities; so that it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work." [1]

In spite of criticisms from such eminent sources, I hazard the belief that the practice is not bad, but on the contrary is positively good, and whether bad or good is at any rate absolutely necessary as long as our legislative bodies persist in concerning themselves with administrative detail. Not a word is to be said in defense of what is virtually the delegation of legislative power to committees in matters of public policy involving important governmental principles. These, however, are numerically a very small part of the questions confronting every Congress and Legislature. The overwhelming mass of the business is technical, administrative, or quasi-judicial.

How is it to be best handled? Take, for example, the much criticized river and harbor appropriations. Granted that a committee of Congress is an unfit body to decide whether New Harbor or Old Harbor or some other harbor should be dredged. But Congress itself, sitting as a whole, is a vastly more unfit body to decide. Something anyhow is gained by reducing the number of incompetents passing judgment. They are not incompetent for certain things, but what can the mass of Representatives be certain that they know about the needs of some little harbor of which most of them never before heard? Or take the pension

[1] *Congressional Government*, 78.

bills that brought applause to President Cleveland because of his vetoes. You say the pension committee did bad work. Very likely, but would not House or Senate have done far worse? The committee has at least the opportunity to hear and examine evidence, as well as to deliberate. House or Senate cannot spare time to study the facts in these matters of administrative detail. It would take those bodies a century to go into each matter with the thoroughness of committee procedure.

Undoubtedly we do not do the thing in the best way, but it is the only way if our lawmaking bodies are to make rules and regulations as well as laws, if they are to dispense justice to claimants, if they are to continue the pretense of being expert in administration. Only by having thirty, forty, or fifty "little legislatures" can even a sizable fraction of the work be done. That is the real reason why we legislate by small groups, subject to the revision of the full assembly. Perforce this revision is hasty and inadequate. It must be assumed that most of the committee work has been done right. The marvel is that under the conditions so much of that which is imperfect is detected and corrected.

Of course there is complaint that the scrutiny is not close enough, that too much reliance is placed on the judgment of the committees, and that the tendency to follow them blindly permits them to prevail with much that ought not to be approved. For instance, Professor Beard, in his "American Government and Politics," says "it is by the committee that good measures are often smothered or riddled by amendments, and pernicious measures carried through the Legislature without adequate scrutiny." Had he served in such a Legislature as that of Massachusetts, he never would have given space to such an argument. He would have found that amendment in matters of detail is far more wisely made in committee than on the floor. The judgment of the committee in respect thereof is usually sound, and experience proves it more often correct than the judgment of the House as a whole. If the proposed change goes to the essence of the matter, previous study by a committee more often helps than hurts.

Yet committees are not infallible and it would be unfortunate if in fact their use precluded amendment by House or Senate itself. That is not the case in Massachusetts; amendments are readily and freely made in the course of debate It is not the case

in Iowa. The "Legislative Manual" of that State says committee amendments are considered first and often are amended before adoption. Then come amendments from the floor, and the Journals show a large number of these are offered. In a recent Senate more bills were amended that had no committee recommendations than those that had amendments proposed by committees; and a number of bills to which there were proposed committee amendments were rejected. Surely of these States it cannot be said that, because some committee has reported, "pernicious measures are carried through the Legislature without adequate scrutiny." No proof comes to my notice that elsewhere such a regrettable consequence generally follows. In the very nature of things it is improbable. Although the backing of a committee may have much influence, yet the measure that is pernicious almost always arouses too many enemies to let it run the gantlet of House and Senate without criticism.

Under the system of ministerial responsibility, which is usually favored by those who condemn American committees, it is significant that the forward-looking men urge committees for the very purpose of greater freedom of amendment. In the German Reichstag, where bills were not always referred to committees, Lowell said it was noteworthy that the more advanced Liberals constantly urged such a reference in the case of Government bills, because the authoritative influence of the ministers was thereby diminished, and greater opportunity was given for criticism and amendment; while the more moderate parties, following the lead of the Government, often preferred an immediate discussion of important measures by the full House, without the intervention of any committee at all.[1]

Even in England, with the Cabinet system so often held up for our admiration, it is urged that more questions should be handled after the American fashion. There is no small significance in the opinion of such a man as W. E. H. Lecky, who rarely saw the good in anything democratic. "The House of Commons," he said, "as a whole is becoming so unfit for the transaction of the details of business that it will probably more and more delegate its functions to committees; and these committees submit great questions to a thorough examination, bring together the most competent practical judges and the best avail-

[1] *Governments and Parties in Continental Europe*, I, 255.

able information, weaken the force of party, and infuse into legislation something, at least, of a judicial spirit." [1] Thus English thinkers urge imitation of the United States, while American reformers urge imitation of England. Distant hills are always greenest.

Another of the objections raised to the American system is that the introducer of a bill gets no chance to protect his offspring, at least in its infancy, unless he happens to be a member of the committee to whose mercies it is entrusted. There is something in this argument, but it militates with equal force against the bicameral system, which precludes the parent of an idea from fighting for its life in the body of which he is not a member. Furthermore, if experience proved this to be a really serious objection, the logical deduction would be that no bills are likely to come of age except those born within the legislative chambers, which everybody knows is far from the case. It may be doubted whether often there is likely to be great value in a measure that has but one warm friend, its parent.

No more serious is the objection that the committee system creates unfortunate rivalries for the right of way. Nothing of the sort develops in Massachusetts or in other States where every petition gets an answer, every bill that has been introduced gets a report, every report gets its place on the calendar, and the calendar is disposed of before prorogation. In Legislatures that do not finish their work, as also in the overburdened Congress, committee rivalries may do harm, but if there must be preferences, why are not committee rivalries as likely to meet the need as any other system? The blame, if blame there be, should fall on the situation and not on the methods it produces.

Even of less weight seems to me the criticism that the committee system, by shifting the center of gravity from the floor to the committee room and lessening the opportunity for debate in the open, disastrously reduces the attractiveness of legislative life for strong men. Yet as keen a man as E. L. Godkin declared this to be the most serious defect in the committee system, and the hardest to remedy. Said Mr. Godkin: "In recent days, legislatures in all the democratic countries have been made repulsive to men of mark by the pains taken 'to get business done' and to keep down the flood of speech. Everybody who enters a Legislature now for the first time, especially if he is a man of talent

[1] *Democracy and Liberty*, I, 243.

and character, is bitterly disappointed by finding that the rules take from him nearly every opportunity of distinction, and, in addition, condemn him to a great deal of obscure drudgery. It is only by the rarest chance that he finds an opening to speak, and his work on the committees never shows itself to the public. It consists largely in passing on the merits of the thousands of schemes concocted by inexperienced or ignorant men, and has really some resemblance to a college professor's reading of 'themes.' In fact, the committee room may be called the grave of honorable ambition. We find, accordingly, that only few men of real capacity, who have once gone to the Legislature or to Congress, are willing to return for a second term, simply because they find the work disagreeable and the reward inadequate." [1]

This so hopelessly confuses causes and results that one is at a loss to know where to begin refutation. It ignores the fact that somewhere, somehow, by somebody, the work now done in committees must be done. If it is not agreeable to men of real capacity, shall it be left to men without real capacity? Will it be less disagreeable if it is transferred to the floor? How will that increase the speaking opportunity for the man of talent and character? Is it the rules that deprive such a man of the opportunity for distinction, or the volume of business that compels the rules? And is it the case that any considerable number of men with or without capacity decline a second term in Legislature or Congress? True it is that long terms of service either in Congress or the Legislatures are not the rule, but that is from causes having nothing whatever to do with the committee system.

Akin to this particular criticism is that which blames committees for the decadence of public interest in the proceedings of Congress and Legislatures. This strikes me as far-fetched, but Bryce includes it in his list of defects, and it should therefore get at least a word. It may be that lack of interest is in some measure due to the small proportion of debate that has any elements of the dramatic, the picturesque, or the vital, but evidence is wholly lacking to show that this proportion is smaller than of old. The colonial Journals indicate that in olden days too the bulk of the business was trivial. Men who served in the early Congresses were constantly complaining of the waste of time on inconsequential things. May it not be that the wonderful in-

[1] "The Decline of Legislatures," *Atlantic Monthly*, July, 1897.

crease in the abundance and diversity of social interests in these later years has made it impossible for the petty phases of lawmaking to draw and hold public attention?

Another complaint is that committees by working independently produce conflicting and bad results. In Mr. Wilson's epigrammatic phrase, "our legislation is conglomerate, not homogeneous." [1] Elsewhere he has described it as "haphazard, incoherent." Bryce thought the system lessens the cohesion and harmony of legislation. This type of criticism assumes that there ought to be cohesion, harmony, homogeneity. Why? The purpose of government is not single, save in the most abstract sense. The common welfare is to be advanced in a thousand directions that have no closer relation than the thousand fields of social activity with which they are concerned. The comparison with a single industrial enterprise is wholly fallacious. The directors of a great corporation may well devise a unified program for the sole purpose of earning dividends from a group of closely allied activities. Nothing of the sort appears in government. Who but a dreamer can conceive any relation between the suppression of crime and the building of good roads? or between universal military training and the law of negotiable instruments? or between the conservation of water-power and the building of an asylum for the insane? Government itself is of necessity conglomerate, not homogeneous. No charge lies against a method of lawmaking that corresponds precisely to the purpose and character of lawmaking.

It is true that governmental activities, like social activities, overlap. This results in more or less of conflict, and there is no question that two committees will sometimes take opposite positions on matters in the twilight zone between them. Sometimes, too, there might well be more of harmony between the policies of two governmental departments. Observation, however, of what actually takes place in a State like Massachusetts, where there are now a hundred fields of governmental activity, as measured by that many departments and sub-departments, shows no serious amount of conflict or of friction, and no serious interference or waste of effort develops between the legislative committees overlooking these activities. If some bill might come within the purview of either of two committees, it is not uncommon to assign it to them sitting jointly. Thus in 1918 an im-

[1] *Congressional Government*, 113.

portant measure relating to transportation in and about Boston was referred to the Committees on Metropolitan Affairs and Street Railways. Under the rules, as it involved expenditure of public money, it went later to the Committee on Ways and Means. This method reduces conflict to a minimum, and as a matter of fact trouble on this score is negligible in amount. If in less well-regulated Legislatures or in Congress, serious harm develops, it is not because of the nature of the committee system, but because of failure to organize and work it properly.

As if the two faults were related, lack of coördination and loss of responsibility were intermingled in a scathing criticism by Joseph H. Choate, Jr., in the "North American Review" for January, 1916. "The present pernicious committee system," he declared, "is the bane of all American legislative bodies. This system, by scattering responsibility among a score of separate committees, which act without reference to each other, and consist of men not known to the public in connection with their duties, makes the work of any Legislature inharmonious and uncorrelated, and deprives the people of all real power of holding any one accountable for bad measures." Mr. Bryce and Mr. Wilson had each blamed committees for their impairment of responsibility. Surely it is audacious to question so eminent a trio. Yet one may gain courage from recalling that Madame Roland found crimes to have been committed in the name of Liberty, and from reflecting that likewise follies may be committed in the name of Responsibility.

Responsibility is as hard to define as Liberty. Without trying to frame an adequate description of its purport, let us assume that the sting of it lies in punishment. A man is to suffer for an error that can be justly laid at his door, the theory being that certainty of punishment will make him cautious and virtuous. With the theory there can be no quarrel. Its application to government brings the rub. Government may be chiefly a matter of one man — the monarch where (if anywhere) autocracy survives, the Prime Minister of England, in time of war the President of the United States. Or there may be sharing of leadership — the National Assembly of France, the American Congress in time of peace, the State Legislatures, each dividing power with Cabinet, President, Governor, or party leaders, as the case may be. The two methods, inexactly described by the words "autocracy" and "democracy," shade into each other, but their

outlines are distinct enough to give contrast. Democracy secures responsibility through the device of political parties. It makes little attempt to punish individuals as such. It holds that in such a matter as the making of laws, wherein many men are asked to share, it would be unjust and impracticable to individualize responsibility. The vast range of legislation goes far beyond the mental capacities of any one man or any small group of men. No single human being so nearly approaches omniscience that he can reasonably be expected to pass intelligent judgment on the wisdom of all the proposals coming to even a single session of a State Legislature, much less the thousands on thousands flooding Congress every two years.

What the critics really have in mind is that very small number of important and vital measures upon which there may usefully be party division. By reason of these they damn the whole committee system. Some day we may learn how to separate from the mass the few great questions of public policy. Meantime it is idle to denounce by reason of irresponsibility an effective, practical, sensible way of handling the great mass of the business, in regard to which there would be gross injustice, marked lessening of efficiency, and no compensating advantage, were a system securing individual punishment substituted.

Even the critics of the committee system admit it has various advantages. Under it far more measures can be handled. Worthless bills can be easily and quickly killed. The chance of hasty and ill-considered legislation is lessened. Work is more fairly divided. Every member gets an opportunity to have a share in lawmaking, where, with only debate on the proposals of a ministry, the great mass of members can do nothing but vote. In committees many men can apply facilities and capacities developed by their usual vocations, which the lack of ease in public speech keeps them from exercising on the floor of a House. Each committee acquaints a few men with some one field of governmental activity. They become specialists, with all the gains that modern development has proved to spring from specializing and the subdivision of labor. Some of the members are almost sure to serve on the committee several years, thus carrying to the newcomers knowledge of the routine of business, together with other benefits of experience. Particularly useful may be their acquaintance with the capacities and failings, hobbies and prejudices, resources and limitations, of the administrative officials whose

recommendations are to be accepted or rejected in whole or in part.

Furthermore, committee hearings disclose in some degree the attitude of public opinion and the extent of public demand. They give chance to hear both sides without the bias of partisanship and the prejudice of personality, better than is possible under the conditions of legislative debate. They permit the taking of testimony, the preservation of evidence *in extenso*. They facilitate the use of experts. They furnish an easy means of communication between the legislative and executive departments.

Bryce noted as an advantage of committees their replacing of the system of interrogating ministers in the House that prevails in most European chambers. Curiously enough, where Bryce, an Englishman, saw gain in this particular, Woodrow Wilson, an American, saw loss. Said Mr. Wilson: "Resolutions which call upon officials to give testimony before a committee are a much clumsier and less efficient means of eliciting information than is a running fire of questions addressed to ministers who are always in their places in the House to reply publicly to all interrogations." [1] It may be that to secure the attendance of officials by means of resolutions is a clumsy method, but there is no need whatever for it and as a matter of fact it is rarely used. Customarily officials cheerfully present themselves in committee rooms whenever invited, and experience does not suggest that this method of eliciting from them fact and opinion fails to produce all the desired results.

Committees, too, furnish better means for the scrutiny of administrative departments, study of their efficiency, investigation of their defects. If this is to continue a province of the legislative department, the function of committees in connection therewith should be elaborated rather than replaced.

[1] *Congressional Government*, 147.

CHAPTER IX

THE COURSE OF BUSINESS

Action on bills accompanying committee reports constitutes by far the larger part of the work of an American lawmaking body. Manifestly it is desirable that these bills shall be taken up with some sort of system. Members ought to be protected against surprise, and so it is customary to provide that bills shall not be considered on the day when they are reported. Any respectable Legislature will require that they be printed, and printing takes some time. Also it is reasonable that members particularly interested shall have opportunity to study a bill against occasion for amendment or debate. Whenever more than one bill is in hand, some method of choice is necessary. With many bills awaiting action, as is often the case, the need of such method becomes insistent.

These considerations all point to the desirability of a predetermined order of business. The Legislatures for the most part secure this by what is commonly known as a "calendar," a printed list of bills, orders, and resolutions, which are to be taken up consecutively unless otherwise provided by rules or by action of the House in any particular instance. The National House of Representatives classifies its bills in calendars, but these are only lists that, with certain minor exceptions, give no indication of the order in which bills will be considered. Hence sprang one of the cardinal defects of congressional practice. Members rarely knew in the morning what was to be the business of the day, much less what was to be the business of the next day. Even the little assurance that might be supposed to come from the rules adopted at the beginning of the session proved of slight worth, because the days they set aside for certain classes of business are ruthlessly taken for other matters whenever the leaders think best. The program is really in the hands of the Steering Committee (an unofficial committee of the majority party), of the majority floor leader, and of the Committee on Rules. For many years custom did not encourage frequent announcement in advance.

When complaint of the situation was made by R. Walton Moore of Virginia, supported by former Speaker Champ Clark

(May 11, 1920), he was answered by James R. Mann, of long experience in the House, who argued that we could not in this matter follow the example of parliamentary bodies in other countries, because we lack centralized authority such as is found in the cabinet form of government. He recalled the outcry against "Cannonism," when Speaker Cannon had in operation under him, "not an autocratic organization at all, but the smoothest working legislative machinery that had ever been known in this House." Mr. Mann thought that in the absence of such organization, it was impossible to tell very far in advance what would come out of the constant struggle between committees for a chance to get their bills considered.

With all due respect for Mr. Mann's conclusion, it may be pointed out that he did not meet Mr. Moore's statement that in the extra session (May–November, 1919) the House had acted, he thought, on twenty-one matters under special rules brought in by the Committee on Rules, and that with a single exception these matters were taken up immediately on the adoption of the rules. Speaking to those familiar with such special rules, it was not necessary for Mr. Moore to explain that matters so brought in are among the most important the House considers. They are the proposals picked out from the mass because of such consequence as to deserve the right of way, and they include most of the fighting matters. No valid reason suggests itself why there should not be at least a day's notice of the intention to bring in these special rules. They are in essence nothing but the program of the leaders. Such a program ought not to be allowed to take a House by surprise.

The force of this argument led Frank W. Mondell, the Republican floor leader, to begin, late in 1921, the experiment of a bulletin, at first posted in the lobby, and then sent round to the members once a week, announcing "a tentative plan of business." This proved so great a convenience to everybody that at this writing it looks as if any lengthy relapse into secrecy and mystery would not be endured. Surely it is to be hoped that the experiment will lead to more orderly preparation for handling the nation's business and to a system that will permit better work.

In this matter Congress has been far behind at least some of the national assemblies in other lands. For example, in France the President at the end of each sitting presents the Order of the Day that he has prepared for the next sitting. This may be de-

bated by the Chamber, and so kept within its control. In England statesmen have long appreciated the importance of thoughtful and timely preparation for the conduct of parliamentary affairs. In 1854, when a select committee of the House of Commons was considering means for improvement in regularity and dispatch, the Speaker of the House testified: "In all the improvements we have yet made in the conduct of the public business, we have endeavored, as much as possible, to let the House understand exactly what questions they will have to discuss, and to prevent surprises, and also to give some certainty to our proceedings." Before a like committee in 1861 another Speaker strongly corroborated this, and said that the most important thing to which the attention of the committee could be directed was "certainty day by day, so far as it is possible, as to the business to be transacted; and that, for despatch, for the convenience of the members, and for decorum of proceedings, certainty is to be regarded as the primary object."

The practice of our Legislatures varies much. Typical of those that like and get the benefits of what might be called automatic sequence is the Massachusetts General Court. There the House (and the same is true of the Senate) has but one calendar, on which matters are placed in the order in which they come to the Clerk, from committees or otherwise. At the opening of a sitting the Speaker begins at the top and calls consecutively. If any member wishes to debate a matter, he shouts "Pass," whereupon the Speaker goes on to the next, thus disposing of the routine on all uncontested numbers. Then returning to those that have been "passed," he takes them up again in order. The Speaker himself never exercises any option. The individual member can hurry action only if he can induce the House to suspend the rules and discharge a matter from the Orders of the Day, either for immediate consideration or by assignment to a time certain which may be earlier than it would normally be reached. Although not uncommon, this recourse is not habitual. Neither is delay often successfully attempted. With the prestige of an early adjournment in mind, the Speaker is likely to frown on motions to lay matters on the table, and sometimes he will succeed in getting through a session without use of the table at all. In the other branch "senatorial courtesy" prevents strict adherence to this righteous policy, and the table sometimes gets heavily loaded, yet most of the business is handled in sequence.

Illinois may illustrate the other extreme of practice. A bulletin prepared in 1919 to aid its Constitutional Convention tells us that in its General Assembly the rules do not force a consideration of bills in the order in which they are presented; and the degree of promptness with which a bill is urged for consideration depends to a very great extent upon the individual member who presented a bill or who has it in charge. Because of lack of interest or because of fear of the result, he may not urge it to second reading or to third reading and vote. Many members think it easier to get a bill through in the rush at the end of the session and so they deliberately hold up bills until the closing days. This was one reason why, for example, in the enactment of legislation the amount of business from June 4 to June 16, 1917, was much greater than that between January 3 and June 4. As to the treatment of the calendar the record of June 5 is cited, when with 147 bills on the House calendar for second reading, the first twenty-two were not taken up at all, and none of the others were called up in the order in which they appeared on the calendar.

Such of our Legislatures as permit the presiding officer to determine the order in which bills shall be taken up expose him to undue temptation. He may present at the opportune moment those he favors, and may hold those he dislikes for a time when the House is in a mood for slaughter. The fair and prudent course is to compel everything to take its turn unless the House sees fit by an exceptional vote, say three quarters or four fifths, to advance or postpone a particular measure.

In this, however, as in all other matters parliamentary, it is unreasonable, it is absurd, it is dangerous, to put the power of prevention within reach of any single member. The lower branch of Congress illustrates the folly of this every day. Its clumsy machinery is at the mercy of "unanimous consent." Analyze its processes and you will find that the chief source of its inefficiency is the power to waste time, to delay, or to block, which is at the command of any one captious, opinionated, impatient, angry, resentful, or notoriety-seeking member.

The Readings

That somewhat intricate matter, the reading of bills, may best be handled by separating the three purposes — (1) deliberate action, (2) adequate information, and (3) orderly discussion.

In Sir Thomas More's "Utopia" "one rule observed in their council, is, never to debate a thing on the same day in which it is first proposed; for that is always referred to the next meeting, that so men may not rashly, and in the heat of discourse, engage themselves too soon, which might bias them so much, that instead of consulting the good of the public, they might rather study to support their first opinions, and by a perverse and preposterous sort of shame, hazard their country rather than endanger their own reputation, or venture the being suspected to have wanted foresight in the expedients that they at first proposed. And therefore to prevent this, they take care that they may rather be deliberate than sudden in their motions."

The description of Sir Thomas More's ideal commonwealth was published in 1516. We may infer in this particular that Parliament had not then protected itself against hasty action by the system with which we are familiar to-day. However, a beginning had probably been made. Proofs are scanty, but there are traces of requiring three readings for bills as soon as bills themselves became the fashion, when under Henry VI the Commons began accompanying their petitions with drafts of the enactments they desired. Precisely when the practice took its present form is not known, but evidently it had become well established when the Journals of the House of Lords began, in the time of Henry VIII, and those of the Commons, with Edward VI, in 1547.

That quaint book, "The Commonwealth of England and manner of government thereof; compiled by the honourable Sir Thomas Smith, knight," published in 1589, a dozen years after the author's death, discloses with gratifying detail how our ancestors handled their work. "Beside the chancellor," said Sir Thomas, "there is one in the upper House who is called the clerk of the parliament, who readeth the bills. For all that cometh in consultation either in the upper house or in the nether house is put in writing first in paper; which being once read, he that will riseth up and speaketh with it or against it; and so one after another so long as they shall think good. That done they go to another, and so another bill. After it hath been once or twice read, and doth appear that it is somewhat liked as reasonable, with such amendment in words and peradventure some sentences as by disputation seemeth to be amended; in the upper house the chancellor asketh if they will have it ingrossed, that is

to say, put into parchment; which done and read the third time and that eftsoones, if any be disposed to object, disputed again among them, the chancellor asketh if they will go to the question. And if they agree to go to the question, then he saith 'Here is such a law or act concerning such a matter, which hath been thrice read here in this house; are ye content that it be enacted or no?' If the Non-contents be more, then the bill is dashed; that is to say, the law is annihilated and goeth no farther. If the Contents be more, then the clerk writeth underneath, 'Soit baillé aux commons.' And so when they see time they send such bills as they have approved by two or three of those which do sit on the woolsacks to the Commons."

This indicates the deliberation that comes from repeated consideration, but not that brought by intervals between considerations. Gain in the latter respect was doubtless part of the marked improvement in parliamentary processes accomplished in the reigns of James I and Charles I. When the practice of various readings was transplanted to this country, spreading them over three days would appear to have become habitual, judging by the following order adopted by the General Court of Massachusetts in May of 1657: "Whereas it is found by experience that the passing and enacting of divers grants, orders and laws upon the first proposal, hath occasioned many inconveniences which might have been prevented by mature deliberation, and that it is the laudable custom of the Parliament of England to pass no bills which have not been there read and debated, it is therefore ordered and enacted by this Court, that no grant of land, law or order (except transient acts) shall henceforth be of force but such as, after reading and mature consideration on three several days, shall be approved and consented to by the major part of the Magistrates and Deputies." [1]

However, William Penn's Charter of Liberties to Pennsylvania in 1682 provided only that "unless on suddain and Indispensable Occasions no business in Provincial Council or its respective Committees shall be finally determined the same day that it is moved." Even this excellent safeguard appears in the course of time to have been neglected, for we find the Board of Trade in 1758 disallowing an act of Pennsylvania that granted to a certain individual a ten-year exemption from suits for debt, because after having been introduced upon the application of

[1] *Records of the Colony of the Mass. Bay in N.E.*, IV, pt. 1, 292.

only part of the creditors, it was passed through all the readings in a single day.

One of the few rules adopted by the Continental Congress that met in Philadelphia in September, 1774, was: "No Question shall be determined the day on which it is agitated and debated, if any one of the Colonies desire the determination to be postponed to another day." It might be inferred that this body did not commit itself to the requirement of three readings.

Nine of the eleven State Constitutions framed before the Federal Union made no reference to the matter, but more likely because they did not deem it fit for constitutional provision than because they were not accustomed to the practice. North Carolina, however, in 1776 definitely required "that all bills shall be read three times in each House, before they pass into laws"; and Georgia in 1777 was more emphatic with — "All laws and ordinances shall be three times read, and each reading shall be on different and separate days," — but it added the proviso, "except in cases of great necessity and danger." The Georgia Constitution of 1789 omitted reference to the subject, but it reappeared in that of 1798, with the exception changed to — "unless in cases of actual invasion or insurrection." South Carolina put the injunction into her Constitution of 1790.

From what was the southern end of the country, the idea spread, first westward, and then to the north. Tennessee started with it, in 1796, clarifying the language somewhat in 1834, and in 1870 strengthening the provision by adding, "No bill shall become a law until it shall have been read and passed, on three different days in each House," etc. Kentucky put it into her second Constitution, that of 1799, with the wording: "No bill shall have the force of a law until on three several days it be read over in each House of the General Assembly, and free discussion allowed thereon; unless, in cases of urgency, four-fifths of the House where the bill shall be depending may deem it expedient to dispense with this rule." Ohio followed Kentucky in 1802, omitting the provision for free discussion, but Louisiana in 1812 retained that provision. Indiana in 1816 permitted two thirds to omit the readings in case of urgency. Mississippi, Illinois, and Alabama made it four fifths; Missouri, two thirds. Arkansas and Florida had joined the list before the idea was accepted by any of the northeastern States, New Jersey being the first of them to take up with it, in 1844.

This New Jersey action meant that experience was teaching some of the older States the need of stronger protection against improper haste than that given by the ordinary legislative rule. The growth of a belief of this sort may be illustrated by what took place in New York. One delegate in the Convention of 1867 proposed that a bill should not be put on its final passage until five days after its introduction; another preferred ten days. It was also proposed that no bill should be passed without consideration in Committee of the Whole, and that every bill should lie over one day after report by such committee; furthermore it was also proposed that no bill be introduced in the course of the last five days of the session. The Commission of 1872 recommended that every bill should have three readings, no two of which should be on the same day, but the Legislature rejected the proposal. The Convention of 1894 got at the danger in another way, with the stipulation that no bill shall be passed or become law unless it has been printed and on the desks of members at least three calendar legislative days prior to its final passage, except when the Governor may certify to the necessity of immediate passage. Michigan has resorted to the same expedient, but requires that the printed bills shall be in the possession of each House five days before passage, and gives the Governor no power to suspend the provision. The fact that in New York the Governor has sometimes had legitimate occasion to certify the necessity of immediate passage suggests that Michigan may some day find itself embarrassed by the want of such an emergency loophole.

Thirty of the States now have constitutional provisions requiring three readings on separate days, save that four of them permit two of the readings to be on the same day, one of the four calling for a two-thirds vote to that end. About a score out of the thirty specify exceptions, mainly in cases of emergency.

As in the case of all other procedural requirements, it is questionable whether these constitutional provisions do more good than harm. They encourage the quibbling that does the legal profession so much hurt in the eyes of the public. They let technicalities thwart principles. They add somewhat to the uncertainty of the citizen as to his rights and duties. By reason of them he is less confident that what purports to be law is law.

Take a single illustration, that given by the case of State *ex rel.* Pitts *v.* Baseball Club, 127 Tenn. 292 (1912). A bill to prevent the playing of baseball on the Sabbath passed the Tennes-

see House and then was amended in the Senate by adding the prohibition of cricket or other game played with ball, bat, or club. Appropriate change in the title was made. In view of the provision that a title must disclose the subject of a bill, the court held that "whenever the caption of a bill is materially changed, the bill becomes a new one," and that the statute in question was invalid because after the change in title this new bill did not have three readings in the Senate. The single reading it received after amendment could not suffice.

Looked at from the bench, this may be good law, but from the parliamentary point of view it is open to argument. Such a sensible interpretation of the rule about germaneness as would be found in almost every legislative assembly except the National House of Representatives (which is absurdly finical in this particular), would declare that the amendment in question was germane, and if it was germane, then parliamentary law would say it altered the bill, but did not replace the old bill with a new bill. Parliamentary law would not countenance the theory that even a radical change in a bill should entail beginning the whole process anew, which is the logical conclusion to be drawn from this Tennessee decision. Experience has not even suggested that such a revolution in parliamentary procedure would be desirable. For many reasons it would be quite impracticable. Amendment should require more precautions than are now customary, but not fresh beginnings. Inasmuch as the men who put into a Constitution the provision that made the trouble in this case could have had no such ultimate effect in mind, the case gives us one more instance of the unwisdom of putting such things into Constitutions.

The original rules of the United States Senate, adopted in April, 1789, required three readings for every bill, "on three different days unless the Senate unanimously direct otherwise." In the House there were to be three readings, no two of them on the same day without special order. When Jefferson came to prepare his "Manual," he found that in the House of Commons, to prevent bills from being passed by surprise, a standing order directed they should not be put on their passage before a fixed hour, naming one at which the House was commonly full. He said the usage of the Senate was not to put bills on their passage till noon. The Senate still has its old rule about reading on different days, but there are no restrictions in the modern practice

of the House. Since 1890 all bills have been introduced in the House by filing them with the Clerk, making a reading by title impossible at that time, but the titles are printed in the Record and Journal, carrying out the real purpose of the rule, which still says "bills and joint resolutions on their passage shall be read the first time by title." The second reading now takes place in Committee of the Whole, or for bills not there considered, in the House itself. The next question is: "Shall the bill be engrossed and read a third time?" If this is decided in the affirmative, the reading is to be by title, unless reading in full is demanded, and the question of putting the bill upon its passage is then to be put. It might be supposed that the time necessary for engrossment would ensure at least some delay, but as a matter of fact the engrossed bill is not the one regularly read on the third reading, for to insist on engrossment before reading would put it over and endanger its success. The rules permit a bill to be read a third time and passed on the same day. No longer is it customary to set an hour for voting. In short, the safeguards of the fathers have disappeared.

In many of the States the same expedition is secured, and the same risk is run, by the suspension of rules. For instance, the Iowa "Manual of Legislative Procedure" says: "Bills are seldom engrossed, but the rules are suspended and they are considered engrossed. Likewise, a bill may not be given a third reading; but the rules being suspended, a reading given for information is considered a third reading. Another rule frequently suspended is the rule which provides for a second and third reading on the same day; in fact any rule can be suspended in either House by a two-thirds vote of the members present."

Iowa legislators are not hampered by any constitutional obstacles in the matter. In States where such obstacles exist, they do not seem to be taken very seriously. The practice reminds one of that famous query: "What's the Constitution between friends?" The weak spot is the general rule which presumes the proper discharge of official duty. Under this rule the courts do not go behind the Journals, and if the entries therein show no violation of the Constitution, the record stands. In Idaho the optimists went a little too far and allowed the Journals to show numerous violations, so that as a result of the decision in Cohn *v.* Kingsley, 5 Ida. 416, the Legislature of 1899 had to reënact most of the laws passed from the time Idaho became a State.

In that case the respondent tried to maintain that the court could not go back of the enrolled bill, but the court took the other view, saying: "Upon this question there is some conflict of authority, but the great weight of authority and the soundest reasoning support the rule that the court not only may, but it is the imperative duty of the court, when this issue is before it, to look to the Journals of the Legislature, and see if, in passing the statute in question, the Legislature have proceeded in the manner provided by the Constitution." It held to be mandatory the provisions requiring three several readings, the printing of bills, and the Yea-and-Nay vote.

Texas in 1876, strengthening its language about exceptions that might be made, by restricting them to cases of "imperative public necessity," sought protection in prescribing that this should be stated in the preamble of the bill and that the vote on suspending the rule should be taken by Yeas and Nays.

In France every measure must pass two readings in each chamber, with an interval of five days, unless otherwise ordered by a majority vote.

Reading at Length

Adequate information was the object in reading bills at length. The practice dates from times when printing was unknown or little used, and the many members of Parliament who were illiterate gained their whole knowledge of bills from the reading by the Clerk and the exposition by the Speaker. It was the ancient custom for the Clerk to read first the title and then the bill itself; then the Speaker read the title and explained to the House the substance and effect of the measure, either from memory, or by reading the breviate, or brief, attached to the bill, and sometimes he also read the bill. In Parliament the bill is no longer read at length. What Sir Thomas Erskine May properly characterizes as "so tedious a practice" [1] is thought to have been rendered unnecessary by the circulation of printed copies. The affixing of a breviate prevailed through the greater part of the seventeenth century, but the analysis of the several clauses now prefixed to a bill meets the need.

Undoubtedly bills were read at length in the American assemblies of the colonial period and for some time after. The documents were almost invariably short, and seldom if ever

[1] *Privileges, Proceedings, and Usages of Parliament*, 352.

printed at the time of discussion. Just when it began to be thought that reading merely the title would suffice, it is impossible to say. Indeed even to-day nobody can be certain from only the phraseology of rules and records just what is the actual practice. In one place "reading" may be construed to mean reading at length; in another, to mean reading by title. More perplexing still, in the same body, by custom, one reading may be at length, and another, of the same bill, by title. For this reason such light as is thrown on the matter by words indicating oral utterance of all the contents of bills is dim and uncertain. Let them be taken for what they are worth, or, as the lawyers say, *de bene esse*.

The first phraseology I find, suggesting that occasion may have arisen for provision in the matter, is that of the second Constitution of Kentucky (1799), which directed that no bill should have the force of law until on three several days it be "read over." Louisiana evidently copied this in 1812. It is not probable that need of more definite mandate was seriously felt much before the middle of the century. Then we find both Ohio and Indiana, in the same year, 1851, attacking in earnest what we may infer had developed into a real evil. Ohio, which had originally directed that every bill should be read on three different days, unless in case of urgency the rule were dispensed with by a three-fourths vote, inserted the words "fully and distinctly," before "read." Indiana, which had begun with much the same language as Ohio, now went farther in explicitness, saying that every bill should be read by sections on three separate days, and that though in case of emergency two thirds might, by a Yea-and-Nay vote, dispense with the rule, the reading of the bill by sections should in no case be dispensed with on its final passage. Next Minnesota, in 1857, said: "No bill shall be passed by either House until it shall have been previously read twice at length." Since it was also prescribed that every bill should be read on three separate days, this was indirect recognition of one reading by title. No way of dispensing with the rule was provided. In the same year Oregon copied the Indiana provision word for word. Kansas in other language sought to secure the same result, in 1859. West Virginia, in 1862, followed Ohio in using the words "fully and distinctly." Nevada's requirement (1864) was for reading by sections, not to be dispensed with on final passage.

After the war, States old and new took up with the idea, until

now a little more than half the total require one or more of the readings to be at length. Only in Ohio and Virginia of these States does there seem to be constitutional warrant for avoiding by any vote whatever at least one full reading, save that Florida and Louisiana make exception of general revisions or codifications, and New Mexico adds thereto bills "for the public peace, health, or safety." Several Constitutions, however, while calling for three readings at length, contain what are known as emergency clauses, specifying that either one or two of the readings may be dispensed with, usually by a two-thirds vote. The abuse of these clauses has been notorious. Probably the most extreme example has been given by Arizona, where it was required that all bills be read by sections three times in each House, but the first two readings might be by title "in case of emergency." Observance of the rule resulted in much delay. The Attorney-General in an opinion averred it the right of the Legislature to enter on the Journal a general declaration of emergency, stating it to be expedient that the rule relating to the reading of bills by sections on first and second reading be dispensed with.[1] Thereafter no bills were read at length except on last reading.

Constitutional changes made after experience are more instructive than innovations evidently copied from other States. So something is to be inferred from the fact that Colorado in 1884, eight years after its organization, changed its requirement for reading at length from three days to two. Why Nebraska, in 1875, should have changed "fully and distinctly" to "at large" is a puzzle, but as at the same time all provision for suspending the rule was omitted, perhaps somebody thought its observance could be more easily slighted if the less definite phrase were employed. More intelligible was the abandonment by that State, in 1920, of the requirement for reading on three separate days. This had been found awkward in special sessions when the work could all have been done in one day. Georgia, in 1890–91, took the trouble of a separate amendment for the sake of getting rid of listening to more than the titles of local bills and bank and railroad charters on first and second reading. Arkansas, after trying two readings at length from 1864 to 1868, went back to the old rule, but developed new stringency in 1874 with a requirement for three readings at length. South Carolina, which in none of its Constitutions had used language implying that

[1] *Am. Pol. Science Rev.*, VIII, 242 (1914).

readings must necessarily be at length, in 1895 said that either branch might by rule provide for first and third reading by title, from which it may be inferred that the contrary practice had prevailed, and that it was thought best to legitimate deviations therefrom.

Governor Hoffman of New York in his message recommending, in 1872, a Constitutional Commission, expressed the belief that provision should be made for "the actual reading of every proposed law on three separate days in each House," and the Commission of 1872–73 recommended reading twice in each House, section by section, but the Legislature did not approve this nor submit it to the people.

On the other hand, a committee of the Pennsylvania Commission on Constitutional Amendment and Revision proposed to that body in December, 1919, the striking out of the words "at length" from the provision relating to the reading of bills. The advice was rejected, after debate showing lack of familiarity with legislative conditions or the real issues involved. Judge Meyer Sulzberger suggested a novel and ingenious conception of the existing provision: "Might it not mean that it shall be read at length by the legislator who has it before him, and has not the legislative practice established that as the true meaning?" He thought cutting out the words "at length" would not relieve the situation. "You cannot read it without reading, and if you read it, you read it at length."

No New England State has adopted constitutional provision in the matter, and in view of the high standard of New England legislation, this is not without significance.

In the National House the rule requires the second reading to be in full. In case of a long bill, unanimous consent may be given to reading instead the committee report. Although a bill has just been read in full, another reading may be immediately demanded on going into the Committee of the Whole, but this rarely happens. Also any member may demand reading at the engrossment stage. All this reading is a sheer waste of time, profiting nobody. I have rarely observed a single member listening to the reading of a bill. Printed copies of bill and report are at hand, for anybody who chooses to take one as he enters the door, or who by pushing a call-button beside his seat will summon a page and send for one. No man able to read would try to comprehend the details of a bill by listening when he could get

a printed copy. Nevertheless, the incapacity of the House to throw off outgrown forms continues this lamentable waste of time without so much as a protest.

In the aggregate this waste is really very serious. The clerks read distinctly, and though rather fast, seldom more than two hundred words a minute. The enactments of the 65th Congress (1917–19) comprised about 840,000 words. Therefore a single reading occupied at least seventy hours, or something more than twelve average working days; i.e., more than two weeks of the time of the House. Taking into account the matter that was read twice or three times, together with the bills that failed of enactment, including several of the big appropriation bills, it is probable that nearly if not quite a month of the term was consumed in mere clerical enunciation.

Worse yet in essence, because deliberately malevolent, is the waste due to the power given to any one member to demand the reading of the engrossed bill in full. This demand is likely to be made at the end of the day when a vote has been taken after a long fight. Some loser, sore and spiteful, will make the demand when he well knows it is sure to result at once in nothing but the adjournment of the House. The bill will go over for its final stages, but then there will be no debate, amendment, or reconsideration. Very rarely the delay may prove fatal, and the chance of this, however small, may sometimes warrant the procedure, in the eyes of the minority, but for the general good it ought to be discarded. Should the House see fit to secure a second opportunity for genuine consideration, that ought not anyhow to be dependent upon a demand for reading the engrossed bill in full.

In the Senate by 1843 all three readings had come to be by title, but when the attention of the Vice-President was called to the matter, he ruled that the second reading should be in full and for a few days the members had to endure this, but it took so much time that presently the very man who had objected said he hoped it would be the understanding in the future that all bills would be read the first and second time, before their reference to a committee, by their titles only, unless any Senator should call for the reading of particular bills entire. In 1872 Senator Anthony in the chair had occasion to rule that it was the right of any Senator to call for reading in full upon the question of the third reading or the passage of a bill. On the 7th of September,

1916, Senator Penrose of Pennsylvania objected because the Clerk was rattling through the reading of the Journal, making it a farce, the Senator thought. His point of order was brushed aside, but he succeeded in saying: "There has been too much of a practice in the last two months of passing bills without reading them, just reading the titles. I have known prominent lawyers in Pennsylvania and prominent citizens who had been sitting in the galleries come away with signs of disgust at the way the public business has been proceeded with in this body during the last six weeks. It is absurd to pass bills by only reading their titles, and even that reading conducted in a rambling fashion."

Mr. Penrose came from Pennsylvania. The Constitution of that State has said since 1873: "Every bill shall be read at length on three different days in each House." The laws passed at the session of 1915 cover 1107 pages, with about 525,000 words. The speaker who enunciates more than two hundred words a minute must have an entertaining subject and be gifted with rare oratorical power to hold the attention of his audience and be understood. At half that rate of speed, most men would not comprehend a statute. But allow the reading clerk two hundred words a minute and you will find that it would take him about forty-four hours — say eight days — to give the Pennsylvania laws enacted in one session a single reading. Her Constitution calls for six readings — three in each branch. That makes eight weeks of words for only the laws enacted. To this must be added all the bills introduced that had but one reading, as well as those that succumbed after getting farther along the road. Would three months be an extravagant estimate for the aggregate?

The mere statement of these figures shows the folly of the thing. Of course no body of sane men would endure such an imposition on human powers of suffering. What takes place? Judge by the story Samuel Bryan Scott tells of a filibuster against the school code toward the end of the session of 1909. This enormous bill, containing hundreds of sections, had to meet determined opposition to many of its provisions, and, merely for the purpose of delay, the opponents of the measure demanded that it be read word for word. The weary night dragged on. The weary clerks droned on, while a vigilant filibusterer sat at their feet and, with finger on page, followed the text to see that nothing was omitted. After a while the clerks collapsed entirely and volunteers from the members took up the work. Gradually

the members drifted out, or went to sleep in their chairs. If a quorum remained, it is certain that less than a quorum was awake. At last it struck some original soul that the constitutional requirement would be satisfied if several read at once, beginning at different places. So a reading squad of ten was organized and all read simultaneously. The scene that followed suggested a strike on the tower of Babel. The idea was, no doubt, unsound constitutionally, but practically it broke up the filibuster and saved the school code for the more dignified death of the Governor's axe. At the next session, however, a similar bill was passed and signed.[1]

Everywhere that such requirements prevail the inevitable result is that the Constitutions are not observed, which is bad for the Constitutions and bad for the public. It is one of the utterly absurd and wholly useless ways in which we breed disregard for law. In Illinois, with a Constitution calling for reading "at length," the bulletin prepared in 1919 to aid a Constitutional Convention said the practice had developed of entering on the Journal a statement that a bill had been read at large on three separate days, when in fact this had not been done. In either House of the Illinois General Assembly, for a member to insist that a bill be read in full is to employ obstructive tactics in connection with the conduct of legislative business. The Constitution of California says that "on the final passage of all bills they shall be read at length." Hichborn's "Story of the California Legislature of 1909" avers that in the course of the last three weeks of the session each House made records of passing more than a hundred bills a day. Were they read at length? Impossible. What takes place wherever such conditions prevail is that usually the alleged compliance with Constitution or rule that gets recorded in the Journal has been a farcical pretense. The Clerk mumbles the first few and the last few words, or contents himself with merely the title, and lets it go at that. Then with a complacent conscience he covers up the fraud by a false entry on the Journal, which the courts will not question.

These are hard words with which to characterize a widespread practice at which many honorable men connive. From one point of view they are justified. In fairness to them it should be pointed out that this would be a sorry world if we had invariably to live up to the letter of the law, and sorrier still if with two

[1] *State Government in Pennsylvania*, 25.

constructions of a law possible, we insisted on the more inconvenient. The courts are for the most part human enough to recognize these practical conditions, and to find a way for meeting them if it be possible. For instance, under the provision of the Michigan Constitution, that "every bill shall be read three times in each House before the final passage thereof," it has been the practice for many years to read bills the first and second time by title, and the third time at length, unless by unanimous consent the third reading be dispensed with. In Hart *v.* McElroy, 72 Mich. 446 (1888), the court refused to overthrow the practice, saying: "It would deprive us of all statutory law. The Constitution, in terms, does not direct that the reading shall be at length, and while such reading might be the better practice, we cannot hold that it is imperatively required that it should be so read more than once."

There are half a dozen or more of other States where the same question might make trouble because the Constitution requires reading without defining it at all. A joint committee of the Iowa Legislature concluded in 1897 that if it be doubtful whether a court would construe the provision as mandatory or directory so far as it relates to the full reading of a bill, "then the wise, prudent, and careful legislator would resolve the doubt in such a way as to avoid the question of the constitutionality of the law being raised, and we think should insist on a full reading." The Iowa "Legislative Manual" discreetly says: "In practice the reading clerk goes through the form of giving a bill its full reading."

Where the terms of a Constitution are explicit, the judges cannot be expected to disregard their plain purport. It is hard to see how the Supreme Court of Minnesota could have avoided the answer it gave to the question of whether the constitutional requirements about the reading of bills were mandatory. The matter came up in Bd. of Supervisors of Ramsey County *v.* Heenan, 2 Minn. 281. Though the act involved was sustained, the court said the provision, that "no bill shall be passed either House until it shall have been read twice at length," was intended to be absolute, and it was intended that the validity of legislation should depend upon compliance. Nevertheless in Minnesota practice the titles alone of the bills are read, the appropriation bills being the only ones that are read by sections and in full, this being on account of the number of amendments usually offered.

The problem is not quite so serious when a legislative rule rather than a constitutional provision is in issue, but the principle involved is the same. We are told that although the rule of the Wisconsin Senate calls for the third reading at length of all bills appropriating money, it specifies that suspension of the rule may be had by unanimous consent, and in practice that is what takes place, only the appropriation clause being read. Why the rule? There are, to be sure, rules just as there are laws, many of them wisely preserved though not often observed, that answer a most useful purpose on occasion. This is not that sort of a rule, but belongs in the quite different class of rules that, if ever to be enforced, should always be enforced. This may be seen from the real purpose behind the rule. That purpose, and the only defensible purpose, is to guard against surprise and deceit. An Illinois episode may illustrate what seemed to be the need. In 1863 a Senator introduced a bill purporting to grant a charter to the Wabash Railroad Company. Accepting his word that it was an ordinary charter, the Senate passed the bill without formal reading. In the House of Representatives it was likewise passed without reading or discussion. Instead of a bill to incorporate the Wabash Railroad Company, Governor Yates found a bill chartering a huge corporation authorized to build and operate a street railway on the principal streets and bridges in Chicago and its suburbs.

If the requirement of oral reading in full be made to guard against chicanery of that sort, strict compliance with the rule ought never to be waived or evaded. The requirement can be defended, however, only if no other safeguards, adequate and less wasteful, are at hand. Nowadays there are plenty of such safeguards to be found in every well-regulated Legislature. The printing press alone has in fact robbed the rule of what value it ever had. The eye is better than the ear for absorbing the contents of a document. So difficult is it to comprehend any but the simplest bills when they are read aloud in an assembly that most men will not even make the attempt. No bill is ever read aloud in some of the best Legislatures in the country. Experience shows the precaution wholly needless. It ought to go.

CHAPTER X

STAGES OF PROGRESS

Orderly discussion entails, of course, the reading of titles of bills, and various readings are necessary to mark the stages of progress. The significance of these will be better understood if something is known of their history. Originally the first problem of the man who wanted a law was to get the ear of the House. There were two ways of doing it. Whether a member or not, he could petition; or if he was a member, he could ask leave to introduce a bill. The second course required an answer to the question, and time was when assemblies discussed whether that answer should be Yes or No. Long ago, however, the request for leave to introduce became a mere form, an affirmative reply being taken as a matter of course.

After the bill had been introduced — that is, once the House had consented to listen — the bill was read, and hence the "first reading of a bill." Next came the question of whether the proposal should be entertained; that is, whether the House would or would not discuss the subject. This brought the paradox of discussing a thing while they were discussing whether they would discuss it, and the outcome was that this stage became a discussion of policy — of general principles as distinguished from details. Such it still remains in the English Parliament, in Canada, and very likely in all the other British possessions with law-making bodies. Doubtless, also, such was the practice in all the American colonies. At any rate, one of the rules adopted for the Pennsylvania Assembly in 1703 was: "That at the first Reading of Bills, the Members avoid any close Debate, and seriously deliberate on the Contents, in order to their better Information before the second Reading." Now, however, with us discussion at this stage has been generally if not wholly abandoned. Yet the forms to a considerable extent survive, though the life has gone out of them.

It is this survival that often puzzles novice or stranger. For instance, the rule of the National House still reads: "Bills and joint resolutions on their passage shall be read the first time by title and the second time in full." As a matter of fact that first

reading does not take place at all, but the requirement is assumed to be met by printing the title in Record and Journal. Formerly the second reading took place before the bill was sent to a committee, but now it takes place when bills come up for action. Bryce contrasts this with the English practice in terms implying criticism. He says that as there is no debate on the introduction or the second reading of a bill (he means before it goes to a standing committee), the public is not necessarily apprised of the measures which are before Congress. "An important measure is of course watched by the newspapers and so becomes known; minor measures go unnoticed." In Parliament, he points out, there is usually debate on the second reading, and this debate attracts notice. "Members often receive from persons previously unknown to them suggestions regarding pending measures." The answer is that the volume of business in Congress has made the continuance of the old practice impossible. Not until Congress rids itself of trivialities and administrative detail can a revival of preliminary debate be contemplated.

There is variance in the practice of our State Legislatures. Massachusetts long ago discarded the superfluous reading between introduction and commitment. It has not come to my attention that any State other than Virginia has yet followed Congress to the extent of allowing bills to be committed before their titles have been read aloud to the House. Some of the States have discarded one of the readings by committing bills directly after the first reading; others still go through the form of a second reading. In Iowa the rules say that "the first reading of a bill or joint resolution shall be for information," and if no objection is made, "the bill or joint resolution shall go to its second reading without further questioning." In some States, as, for example, Minnesota, "if objections are made to a bill on its first reading, the question shall be: 'Shall the bill be rejected?' If no objection be made or the question to reject be lost, the bill shall go on to its second reading." Elsewhere, as in Georgia, "no debate shall be admitted upon any bill at the first reading." There can be no question that the tendency is toward saving time by avoiding debate at this stage. Since in practice when debate is not invited upon introduction, or is specifically forbidden, and when commitment does not take place until after second reading, the first and second readings virtually amounting to but one stage, the waste of time by an idle repetition of words will sooner or

later result in their abandonment. In all probability, too, the Legislatures will presently follow Congress in cutting out all reading before commitment. If you but calculate the time now lost, say in Massachusetts, in the reading of more than two thousand titles of bills introduced at each session, you will see why common sense should assert itself.

What should be the number of stages for debate is a more difficult question. In Parliament upon introduction there may be debate as to policy, but not on details. Next the bill goes either to a standing committee or to Committee of the Whole, and if to Committee of the Whole debate occurs there on details. Debate on details occurs at the next, the report stage, upon the report of a standing committee, or that of the Committee of the Whole if amendments have been made, but if the bill is reported from Committee of the Whole without amendments it is assumed the details are satisfactory and there is no report stage. On third reading the only question raised is whether the House approves a measure as a whole. This, it will be seen, may give two debates on the policy, also either one or two on the details. In Canada, although in general the English routine prevails, a bill may be fully debated on third reading and sent back to the Committee of the Whole for further change.

In Congress full debate is secured in a Committee of the Whole upon such matters as go there, being chiefly bills involving the raising and spending of money; and in the House itself on other bills. When a bill is reported back to the House from a Committee of the Whole, the practice is to move the previous question at once, thus preventing a second discussion. Then after affirmative action the door is double-locked by voting to lay on the table a motion for reconsideration, it being impracticable to take off the table a matter once laid there. Debate at the last stage, on the question of passing a bill, is not impossible, but is very rare, because of the almost invariable use of the previous question. It will be seen that customarily a bill receives but one debate.

The Massachusetts practice is more liberal. All bills go to standing committees before debate as in Congress. The Committee of the Whole is not used once in a decade. There are two stages for general debate and amendment, first on the question of ordering the bill to a third reading, and then on ordering it to engrossment. After the bill has been engrossed, there may also

be debate on it as a whole, but no amendment, the question being on passage. Occasionally if opinions nearly balance or strong partisan feeling has been aroused, there may be a motion to strike out the enacting clause, but usually the will of the House has by that time been so clearly shown as to discourage further contest.

The practice in Iowa, as explained by the excellent Iowa "Manual of Legislative Procedure," is in some respects more simple, in some less simple, than in Massachusetts, and to a man accustomed to Massachusetts ways it seems less flexible and more dangerous. After the superfluous second reading of a bill, the Speaker states that "it is ready for commitment, amendment, or engrossment." Usually it is committed; that is, referred to a committee for consideration and report. In theory the question arises as to whether this shall be to a select committee, a standing committee, or a Committee of the Whole House, but as a matter of fact nearly all bills are sent to standing committees. Although the House might instead proceed directly to amendment or engrossment, it never does. Debate comes on the report stage, and apparently this is the only chance to discuss details with a possibility of altering them, for on the next stage, that of engrossment and third reading, now treated as one step, the rules forbid receiving or debating an amendment. According to earlier procedure a bill could be debated on its merits when put upon its passage, but this is now prevented by the Constitution, which says "the question upon the final passage shall be taken immediately upon its last reading." If it is true that prudence calls for at least two opportunities for discussion of details and for amendment, Iowa and States using like methods of procedure are unduly hampered by their rules.

Amendment

Amendment is a legislative procedure necessary to the perfecting of measures. It brings to legislation the benefit of wider judgment than is possible in the committee room. It applies the fruits of debate. By the application of compromise and concession it reconciles views but slightly divergent and increases the likelihood of that public approval without which law is idle. The searching ordeal a bill must pass in running the gantlet of criticism, discloses weaknesses and imperfections that are beyond the foresight of any one individual or small group of individuals.

The most expert draftsmen cannot stop every loophole, meet every contingency. Through the scrutiny of many minds should come gain. Therefore it is advanced as a proof of greater vigilance and efficiency in Parliament that the number of amendments proposed has of late years much increased, and the same fortunate change is probably to be observed in American legislative bodies.

There are, however, countervailing considerations of the most important nature. By reason of them amendment is the weakest link in the chain of legislative procedure. Three hundred years ago Sir Edward Coke complained that acts of Parliament were "overladen with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." Despite all the progress that Parliament has since made in organizing the drafting of bills, ground for like complaint still exists, and chiefly because of the procedure in the matter of amendments.

Let me summon two witnesses. First, James Bryce, whom nobody will accuse of writing extravagantly or without both information and reflection. "The British House of Commons," he says, "is too large for discussing what may be called the technical or formal part of legislation. Its debates in Committee on points of substance are often excellent. But it cares little for harmony, propriety, and conciseness of language. If an inexperienced enthusiast for legal symmetry observes, in proposing an amendment, that his terms will not affect the substance, though they will improve the form, of the clause, he is impatiently rebuked for occupying the time of the House with what 'will make no difference.' On the other hand, changes in substance are constantly made in Committee which have the effect of rendering the form of the measure worse than when it came from the draftsman's hands. Clauses are put in or struck out, exceptions are added, references to other statutes are inserted, which make the sense of the enactment difficult to follow and the construction uncertain."[1]

Secondly, note the judgment of Sir C. P. Ilbert, who as Clerk of the House of Commons amassed the experience that made him the best English authority on the forms and processes of lawmaking. "Amendments," he says, "are often framed hastily, without reference to grammar, logic, consistency, or intelligibility.

[1] *Studies in History and Jurisprudence*, 736.

They are apt to be crowded in at the beginning of each clause or sentence, with the view of obtaining precedence in discussion. The language of a law ought to be precise, accurate, and consistent, but the atmosphere of a crowded or heated assembly is not conducive to nicety or accuracy of expression. Decisions often have to be taken on the spur of the moment, and in view of the possibility of a snap division. At last the amendments are cleared off the paper; the new clauses, often raising the same questions, are disposed of; and the much-buffeted craft, with tattered sails, the deck encumbered with wreckage, and with several ugly leaks in her hold, labors heavily into a temporary harbor of refuge. There is a short interval for the necessary repairs, and then the struggle begins again at the report stage. There may or may not be a sufficient opportunity for making such formal amendments as are necessary to make the measure decently consistent and intelligible. If not, they must be left for the House of Lords." [1]

If criticism of this severity can be passed upon the amending process as it works in the foremost of lawmaking bodies, is it surprising to find the same process working costliest injury in assemblies constituted like those of the American States? Regarding them it is needless to duplicate descriptions. Let one suffice for illustration. Said Governor Hodges of Kansas to the Governors' Conference of 1913: "I have seen bills carefully drawn by experts after months, or perhaps years of the most painstaking and careful study of the subject, amended on the floor of both House and Senate in a rapid-fire sort of way, by men who had never given an hour's consideration to the subject-matter, and in the end have seen what might have been a useful law, either weighted down with amendments which cause friends of the original bill to vote against it, or have seen the bill become a law, and its effectiveness frittered away because some Senator or Representative possessed an inordinate desire to put himself in evidence, no matter how." [2]

It is not necessary to emphasize vanity or ambition as the source of the mischief. Often the harm will be done by some perfectly sincere and well-intentioned man who by nature is wont to leap before he looks, to make snap-shot decisions, or to dislike consultation with his fellows. Not infrequently, too, there is a sinister motive in amendment, the deliberately con-

[1] *Parliament*, 81. [2] *Proceedings*, 255.

ceived purpose being to make a measure either innocuous or obnoxious.

The cause of the omnipresent danger and the frequent injury is evident. It lies in the failure of legislative processes to ensure proper consideration for amendments. There is no provision for adequate study and deliberate action. The committee system has developed because we have seen that it is absolutely indispensable to have some method of preliminary investigation and time-taking judgment. We insist upon it in all matters of importance that take the form of bills, but we ignore the fact that precisely the same need exists for the proper treatment of changes in bills, changes that in their results may be of more importance than the original measure.

Our government is built on the assumption that legislative bodies are qualified to say what shall be done. It cannot be too often reiterated that they fail in saying how it shall be done. A big debating society is quite unfit to handle technique. Most amendments are matters of technique rather than of principle. Yet even when an amendment relates purely to purpose and not to method, it ought not to receive unpremeditated, offhand judgment under conditions favoring finality.

The first requisite for safety, then, is that amendments, like bills, shall be studied. Here and there may be found indications that this is coming to be realized. When a committee of the Wisconsin Senate orders the reporting of a bill for passage with amendments, the rule requires that the committee clerk shall submit bill and amendment to the revision clerk, who is to return it to the committee clerk, with approval if the amendments conform to the rules, or otherwise with suggestions in writing, but the revision clerk is to suggest only changes that do not alter the scope and spirit of the bill. This goes but a very short way, does not touch amendments offered on the floor, does not secure any expert judgment on principles involved, but does help a little toward improvement in form.

The Oregon Senate has a far more promising rule: "A bill shall not be amended upon the floor of the Senate, but if the Senate or a majority thereof desire a change in any bill, it may be referred to any committee with instructions to make the desired amendment." This might suffice, were it not for the fact that it is undesirable for any legislative body to take a stand on any matter of principle or purpose until the proposal has re-

ceived deliberate study. We have become convinced of that in respect of principle or purpose formulated in the particular shape we call a bill. England still holds it safe for Parliament to discuss and vote upon policies before committee scrutiny, and that was the belief of our fathers, but we think we have progressed along the lines of prudence and safety in so changing procedure that committee scrutiny will come first. There is excellent reason for the change. All men dislike to reverse their positions. Once they have taken a stand for or against a policy, the advice of committee or experts is likely to fall on deaf ears. That is why an amendment once carried can so seldom be annulled. Therefore I suggest as a possible improvement on the Oregon rule that a motion to amend shall be made in this form: "I move that such-and-such a committee be instructed to consider whether this bill ought to be amended for the purpose of providing," etc. If, upon the report of the committee, the bill is amended, let a rule that cannot be suspended by less than a four-fifths vote provide that the bill shall go to the Committee on Bills in Third Reading or Revision or whatever it may be called, which shall properly draft the amendment to accomplish the purpose intended. Then, upon the demand of any one member, let the amendment be treated as a separate proposition, with as much chance for debate and vote as if it were in fact an independent bill. Under early English practice amendments had to be read a first and second time, like bills. It is a pity the idea in that practice was ever abandoned. Usually now, when an amendment has been adopted, the only way to get another debate and vote on it is by the motion to reconsider, under hampering conditions, with the psychology of the situation against the men who really know what the amendment means and who oppose.

In Massachusetts the Committee on Bills in Third Reading can redraft and properly insert an amendment that has been made on second reading. This most useful of committees is of ancient origin. In the Journal of the House of Deputies for May 30, 1644, appears the entry: "It is ordred, that Mr. Speaker, Mr. Downeinge, & Liftennant Duncome are chosen a committee to consider of ye votes of ye howse, & to drawe them into a forme of order, that exact entry be made of them." [1] This may have been the germ that developed into the idea found a century and a half later in another Journal entry (June 15, 1795). "The

[1] *Records of the Colony of the Mass. Bay in N.E.*, III, 3.

committee on the subject of correction of bills," it read, "reported that it should be a rule of the House, that a standing committee be appointed to whom all bills which shall pass in this House to a third reading shall be thereupon committed for examination and correction." The rule has now grown into this form: "The committee on bills in the Third Reading shall examine and correct the bills which are referred to it, for the purpose of avoiding repetitions and unconstitutional provisions, insuring accuracy in the text and references, and consistency with the language of existing statutes; provided, that any change in the sense or legal effect, or any material change in construction, shall be reported to the House as an amendment." It is to the work of this committee in both branches that the excellence of Massachusetts legislative workmanship is in large measure due. A few other States use the idea. Among them is Wisconsin, directing as follows: "It shall be the duty of the committee on bills in third reading to carefully examine every bill ordered to a third reading and correct errors of orthography, grammatical construction of sentences, and any other errors in the bill, so that the real object of the bill may be clearly stated. They shall report in writing, and the amendments they propose shall be read to the house before being acted upon."

So far as they go, such committees perform a most useful function, but they cannot go far enough. They get no opportunity to insert properly amendments made on third reading. To be sure, if such amendments are made by the first branch considering the matter, they can be attended to in the second, but if made on third reading in the second branch they are apt to fail of proper revision. It would be a gain if these committees were required to revise after every amendment stage. One advantage of such a requirement would be the opportunity it would give for conference between the committee that reported the bill, the Committee on Bills in Third Reading (or Revision), and the mover of the amendment. Often the mover could be persuaded of the unwisdom of his motion and the next day he could consent to its rejection or the substitution of something better. In any case it would be ensured that the amendment covered its purpose.

A Massachusetts rule requires that if an amendment substantially changes the greater part of a bill, the question is to go over to the next day, when further amendments may be made.

In practice this proves of little value, for it is rarely applied save on a point of order, which for various reasons is an undesirable process. Furthermore, it is hard to tell on the spur of the moment whether an amendment really changes substantially the greater part of a bill. Amendments that on their face seem minor often in the end do the most damage.

On the continent of Europe the problem has received more attention and in some respects wiser treatment than with us. At the outset of the Second Empire in France, of course, Louis Napoleon went too far in forbidding the Chamber to amend the bills laid before it by the Government. Time showed him his mistake and among the constitutional reforms granted November 24, 1860, was the right to move amendments to bills, but even then local and private bills were excepted, as well as matters alleged to be urgent. Doubtless he was justly criticized for the autocratic aspect of his original position in the matter, but it was not wholly unfortunate if it led to the reasonable course now followed. Amendments proposed on the second of the two readings, without the consent of the commission in charge, require a formal vote that they may be considered, and it is not permitted to vote on amendments upon the day when they are offered. In the German Reichstag after the second reading of a bill it was put into shape by the President and Secretaries. Thereafter an offer of amendment required the signature of thirty members, and if amendments were adopted the final vote was postponed (except by unanimous consent) until revision had again taken place. Doubtless the practice continues. In the Austrian Reichsrath while discussion was proceeding in Committee of the Whole amendments of all kinds were presented to the House, which referred them to the Committee; but after the final vote of the Committee was taken, no more amendments could be proposed.

The Austrian rule would not be acceptable to the American Congress. Experience has convinced us that as applied to our conditions it would be unwise. We permit no roll-calls in Committee of the Whole, and although a record vote may be secured in the House on any amendment made in Committee, this will not bring a roll-call on some political issue involved in an amendment that has been rejected in Committee. So for the protection and benefit of the minority, the rules provide that after the previous question shall have been ordered on the passage of a bill or

joint resolution, one motion to recommit shall be in order. This motion almost always includes instruction to report back with a specified amendment forthwith. The Speaker is to give preference in recognition for such a purpose to a member opposed, and ordinarily this ensures that the minority leaders, if they wish, can frame the amendment with political ends in mind, so as to put the majority on record.

When the machinery for majority control of the House had become remarkably efficient under Speaker Cannon, one of the devices most criticized was the shaping of special rules by the Committee on Rules so that amendments could not be offered from the floor. This was far from a novelty in Congress, but now attracted wide attention for the first time through being seized upon as one of the pretexts for revolt. Indeed it embodied virtually the autocratic idea of Louis Napoleon — the take-it-or-leave-it policy. As adapted here, this meant domination by the majority caucus, and was intolerable to members of the majority party with independent minds, as it was to all of the minority. The argument in its defense was that on the whole it is better thus to thwart amendments offered by the minority or by disgruntled members of the majority. Fortunately that theory did not become supreme. Wiser counsels now generally prevail and the Committee on Rules almost always leaves opportunity for amendment. When, however, this is prevented, the judicious rightly grieve.

Other Safeguards

Delegate Vedder said to the New York Convention of 1894: "It is an exceedingly common thing and happens at every session of our Legislature that an apparently insignificant amendment is offered on the third reading of a bill. The bill passes with it. The amendment may be innocent in itself. It then goes into the engrossing room, and what was left undone to change the nature of the bill on its third reading is done in the engrossing room, and it goes to the Governor, and no one knows how the amendment got in, and it can be traced to no one in particular. All we know is that the members have voted upon a certain bill, and when it reached the Governor it was an entirely different bill."

It is hard to believe that Mr. Vedder spoke without exaggeration, but if that sort of thing actually had been frequent in New York, there was no excuse for it. A body that can't and won't

control its own clerks is to be pitied for imbecility, rather than blamed for neglect. A perfectly simple remedy, completely efficacious, is the creation of a Committee on Engrossed Bills, whose members compare the parchment with the original draft line for line and word for word. It is tedious work, but by taking turns the members of such committees do not find the labor an excessive sacrifice.

New York preferred to rely on printing as a safeguard. So it provided: "No bill shall be passed or become a law unless it shall have been printed and upon desks of the members, in its final form" — note *final form* — "at least three calendar days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under the hand and seal of the State."

New York was in this matter a score and more of years behind Illinois, which said in 1870: "The bill and all amendments thereto shall be printed before the vote is taken on its final passage." Pennsylvania said in 1873: "All amendments made thereto shall be printed for the use of members before the final vote is taken on the bill." Missouri in 1875 elaborated this somewhat, requiring the printing of an engrossed bill before final passage, as well as the printing of a bill returned to one House after amendment by the other. Colorado in 1876 copied Pennsylvania, but restricted the provision to "substantial amendments." This loophole was widened in 1906 by the Supreme Court, which held, in the case of Board of County Commissioners *v.* Strait, 36 Colo. 137, that the provision did not apply to amendments recommended by conference committees, its opinion being largely influenced by the loose interpretation long made by the Legislature. Nebraska and Idaho also have provisions on the matter. That they have not been inserted in more Constitutions is doubtless due to the fact that the custom of printing and reprinting has spread, and that legislative rules commonly meet the occasion, at any rate in the more progressive States. In such a State as Massachusetts there is never any difficulty in getting a bill reprinted as many times as there may be legitimate need. Probably in some of the smaller States there is unwise economy in this particular.

Three fifths or so of the Legislatures undertake to meet the dangers of amendments on third reading by forbidding them. These Legislatures follow the practice of Congress in combining

engrossment and third reading, with engrossment at least nominally preceding, so that third reading is to all practical purposes the last stage. The futility of the prohibiting rule is shown by the prevalence of evasion. This is accomplished by the use of a time-wasting formula. If on third reading it proves desirable to make an amendment, somebody moves that the bill be recalled or ordered back from third to second reading and recommitted to the committee concerned, with instructions to report with certain amendments forthwith. Thereupon the chairman of that committee, without leaving his place or consulting with any other member of the committee, rises and makes the designated report. Or it may be, as in Ohio, that the bill is referred to a select committee of one, the person proposing the amendment being named, who announces immediately that he has amended the bill as directed. The farce thus concluded, the bill proceeds on its course. The same sort of fiction is made legitimate in Congress by the rule permitting one motion to recommit, the motion customarily including instruction to report back with a specified amendment. It is a fiction that does no particular harm, and no particular good. Simplicity and the saving of time recommend that it be discarded.

The second opportunity to amend, however, ought to be saved, and there are reasons why it might well be amplified, even to the degree established in Massachusetts, where third reading and engrossment are made separate stages in the order named, with just as full opportunity for amendment, and debate also, on third as on second reading. The very fact that evasion of the rule is so common in the States using the practice of Congress, itself shows that the rule seeks to block an opportunity that experience has found to be desirable. It may be that in Congress, with its enormous flood of bills and the imperative necessity for haste, one debating and amending stage is all that can be afforded, but even of that I am far from convinced. Perhaps a second stage without restrictions would be inexpedient, but I am confident that better lawmaking would result if, after at least a day of opportunity for study and reflection, there should be a chance to show that a mistake had been made. As it is now, error can be rectified only by privately convincing somebody in the other branch who will undertake to amend there. This usually means a committee of conference, and in the end may result in more use of time than a second amending stage would have pro-

duced. In Massachusetts the two-stage plan seldom results in two sizable debates. The opposition to a measure usually accepts the outcome of the first contest. When the second results in change, by way either of reversal on the main question or of amendment, generally the judicious will find cause for satisfaction. Certainly laws better in technique result from the more thorough work of the two-stage plan. After working under both systems, I am far from willing to admit that the practice of Congress and its imitators is the better.

Of course controversy must at some time be brought to an end. Modern conditions do not permit the caution shown by the very first representative assembly in America. After it had been in session at Jamestown for five days and the extreme heat led to decision to prorogue, on the morning of August 4, "the Speaker (as he was required by the Assembly) redd over all the lawes and orders that had formerly passed the house, to give the same yett one reviewe more, and to see whether there were anything to be amended or that might be excepted againste." Commendable though such a practice, it is out of the question to-day. Measures must now be concluded separately and a time must come for a decisive vote. Our legislative bodies realize the necessity of this and provide for it in one way or another. The New York Convention of 1846 unwisely decided that the Constitution ought to secure it and so recommended the provision: "The question upon final passage shall be taken immediately upon its last reading." The people, voting on the Constitution as a whole, took this with the rest. Of course the purpose was to prevent any amendment between last reading and passage. Evidently some loophole was discovered, for in 1894 it was deemed necessary to insert specifically, "No amendment thereof shall be allowed." Meanwhile Iowa, Nebraska, and South Dakota had copied the original wording, and that has since been preferred by Oklahoma. Good legislative procedure frowns on amendment at the stage of final passage, and amendment then is commonly provided against by rule, as it ought to be, without burdening the Constitution. Such things are not fittingly put in the organic law. Furthermore, they do positive harm there, not only because they breed lawsuits, but also because they add to the rigidity of legislative processes. There are situations that call for exceptions to all rules, and it is imprudent to preclude meeting those situations.

In about half the States a very wise step is taken to lessen surprise, mistake, oversight, or fraud, by provision that amendments shall be clearly disclosed or their effect indicated by the use of italic or other contrasting type, brackets, asterisks, underscoring, or some device of like purpose. The primary object of this was to secure the printing of original bills so that the reader might at a glance see what change was proposed in existing law. It is an idea equally useful in its application to amendments made in transit, so to speak. When this improvement was urged on officers of the Massachusetts Legislature, demur was made on the score of difficulties in the printing office. They were found to be insignificant and the officers were persuaded to establish the practice without formal order, but it was never followed with the thoroughness of some other States, and the Committee on Legislation of the Massachusetts Bar Association for 1915 found occasion to recommend reform, for the benefit both of the Legislature and the public, criticizing "our present awkward method of merely reciting at length the added or omitted words, and then printing the amended section at length, leaving the reader the puzzle of finding for himself the additions or omissions in place so that he can understand them."

Another constitutional innovation made by Pennsylvania in 1873 was: "No bill shall be so altered or amended, on its passage through either House, as to change its original purpose." Arkansas copied this in the following year, Alabama and Missouri in 1875, Texas and Colorado in 1876, and afterward other States until now it is to be found in more than a dozen Constitutions. The intent is excellent. Citizens have a right to believe that the proposals submitted to a Legislature cover all the matters in which they may take particular interest. When committees have reported on those proposals, fair play demands that nothing novel be suddenly injected by way of amendment. Legislation ought never to expose citizens to being taken by surprise, save in case of emergency. The danger, however, can easily be met by legislative rule. Remedy does not belong in the Constitution. Putting it there accomplishes little more than the encouragement of litigation. Its harm in casting doubt on the validity of statutes more than offsets any possible good. Who can tell what was the "original purpose" of an act? Is it a proper function of a court to decide whether an amendment was in accord with an uncertain purpose? Is the provision

mandatory or directory? These are the questions that perplex. And should the citizen be obliged to hunt through the Journals of a Legislature in order to find out whether the contents of the statute book are valid?

West Virginia, in 1872, required that when a bill or joint resolution passed by one House had been amended in the other, it should be again voted upon by Yeas and Nays in the House of origin, with a majority of all elected necessary for passage. Pennsylvania, in the following year, simplified this by directing such a vote for concurrence in amendments and for adoption of reports of conference committees. Half a dozen other States have followed the unfortunate example. It is one more of the provisions that do not belong in Constitutions.

Senator Hoar in his "Autobiography" (II, 99) says that he was the author of one of the few important amendments to the Rules in his time, providing that an amendment to any bill may be laid on the table, on special motion, without carrying with it the bill itself. "The motion to lay on the table not being debatable, this enables the Senate to dispose promptly of a good many propositions, which otherwise would consume a good deal of time in debate. There had been such a provision as to appropriation bills before. When I first suggested the change, Mr. Edmunds exclaimed in a loud whisper, 'We won't do that.' But I believe he approved it finally." And yet the logic of the change is not apparent. An amendment may be of as much importance as the bill amended. Why should it not have equal chance for consideration?

The harm in such a practice as Mr. Hoar secured comes from the fact that it prevents discrimination. Perhaps discrimination is impracticable. Perhaps the saving of time should be the weightier consideration. Yet it does not conduce to the best lawmaking.

The subject is full of difficulties. On the surface it appears simple. "Let there be," says the critic, "one stage for amendment, and one for debate on the merits." When Professor C. L. Jones found that "in at least one State (North Carolina) bills may be amended on the first reading and many of the States still allow the introduction of amendments on third reading or as some phrase it, up to final passage," [1] he pronounced the practice indefensible. Yet it is to be doubted if any man who ever

[1] *Proceedings*, Am. Pol. Sc. Assn., December, 1913–January, 1914, 204.

served in the Massachusetts Legislature would concede that there ought not to be two chances for offering and debating amendment. It is not safe to allow decision on any proposal for change in law, whether it takes the guise of original bill or subsequent amendment, to receive what would usually be in effect final decision on the part of the body considering it, without two normal opportunities for independent consideration.

Furthermore, actual share in legislation will convince anybody of the impracticability of trying to delimit sharply the consideration of original proposals and of amendments. The amendments too often go to the essence. Men will not vote for the original bill unless amended, or will not vote for it after it has been amended. So there must be more or less intermingling of discussion. The most that can be said is that rules should systematize debate and voting to such degree as may be compatible with adequate consideration of each proposition involved.

Difficulties of the same sort surround the question of voting on amendments. Just as their interdependence compels more or less commingling of discussion, so it embarrasses what may be called separated decision. It is probably for this reason that even so admirable a code of procedure as that in Massachusetts provides for nothing save voting on all amendments and the main question, consecutively, at the close of debate. Where the Committee of the Whole is used, if a bill is taken up section by section, the treatment of amendments may be isolated, but Massachusetts almost never uses the Committee of the Whole, and the result is that the voting on numerous amendments to a complicated measure is most unsatisfactory.

Furthermore, where rule or custom applies the previous question to only the main question, and not to amendments or the collateral questions, a few amendments, those first in order, may get extensive debate, and the rest no debate at all. As a matter of fact a well-balanced debate, with due regard to the proportionate importance of all the propositions involved, is a rare thing in the Massachusetts General Court, and, I suspect, in most American Assemblies.

This was the chief consideration that led the Massachusetts Convention of 1917 to revive the Committee of the Whole. Presently the Committee fell into disfavor, through the impression that it was responsible for the phenomenal length of the debate on the Initiative and Referendum, whereas the fact was that

this resulted from a preliminary agreement by the leaders of both sides not to limit or check discussion. It turned out that this agreement had no practical bearing on the process of handling amendments, of which there were scores. Both in Committee and later in the Convention itself, these were disposed of by a schedule applied under a special rule. They were taken up in the order in which they related to the resolution — a decided improvement over the legislative practice, which compels voting on amendments in the order in which they have been moved. For each amendment there was a specified schedule — so many minutes for the mover, then so many more for general debate, five to a speaker, with an equal time for a member of the majority to close. The maximum of forty minutes for each amendment was not reached on many of the minor proposals. Rarely was it urged that the time available did not suffice for the major proposals. The result was, from the technical point of view, most satisfactory. Everybody had fair treatment; every proposal received adequate consideration; every vote, by immediately following the discussion bearing on it, received decision from those who heard the debate, as nearly as is feasible in a large assembly. The process was orderly, systematic, well-balanced, and just. I commend its imitation.

The Constitution of Greece says: "No project of law is adopted unless it have been discussed and voted by the House of Representatives, once in principle and twice article by article and as a whole, on three different days." As the legislative branch in Greece is unicameral, such particularity of program is clearly commendable. Italy says: "Bills shall be discussed article by article." Presumably separate discussion follows from the provision in Belgium: "A proposed law shall not be passed by either of the Houses unless it has been voted upon article by article."

CHAPTER XI

DEBATE

DEBATE as we now know it is a comparatively modern development. In Greek and Roman times there was plenty of oratory, but little of discussion. Assemblies were swayed by set speeches, orations, harangues. It took the conditions of a representative gathering, a Parliament, to produce running debate. This had matured by, at any rate, the time of Queen Elizabeth, for Sir Thomas Smith, describing the Parliament of that period, says, "with much doulce and gentle terms they make their reasons as violent and vehement one against the other as they may ordinarily, except it be for urgent causes and hasting of time." The transfer of English habits to colonial assemblies saw no modification in this particular. There was, however, at least one episode suggestive of Roman practice, for it is Connecticut tradition that the first step of the General Assembly in 1763 was to appoint three of its ablest men to argue in favor of the right of Parliament to tax the colonies, and three fairly matched opponents to argue against it; that the argument, consuming several days, took place before the Assembly under a pledge of secrecy from all concerned; and that its result was the unanimous agreement of the members against the right of Parliament, and in favor of the lawfulness of resistance.[1] It is probable that such procedure was altogether exceptional and was due to the gravity of the crisis. Nevertheless, it is suggestive. Modern legislative bodies might more often handle important issues profitably in such a fashion.

The tendency is toward more of systematic order in debating. The evident advantage of having speakers present the opposite sides of a question in alternation has established it as an unwritten rule in many modern assemblies that the presiding officer shall secure this in important discussions by recognizing first one side and then the other. The orderly way is to arrange a written list of speakers from which he shall permit no deviation, and this is the established practice in France. In Germany, on the contrary, as in most of the English-speaking assemblies, the rule that the first man up gets the floor, now and then upsets pro-

[1] Alexander Johnston, *Connecticut*, 289.

grams. Where that is the rule, it ought not to be arbitrarily ignored, for it begets a spirit of fair play and allays the fear of favoritism. Deviations from an orderly schedule can, however, usually be avoided by a diplomatic presiding officer.

His difficulties are more serious when there is no program and he must decide which of two or more members has risen first. It took Parliament many years to reach a settled practice in the matter. For a long time decision between two members claiming the floor was left to a vote of the House, but when Hatsell wrote (1781), it had been concluded wiser to put the responsibility wholly on the presiding officer. This has come to give one of the most important and dangerous of powers to the partisan Speaker of a large body where many members struggle for the chance to be heard. Yet the impartial presiding officer is not unknown among us. At least in Massachusetts, and probably in many other States, the man who rises first gets the floor.

More than three centuries ago Parliament "agreed for a rule, That if two stand up to speak for a Bill, he against the Bill (being known by demand or otherwise) to be the first heard." With us no such rule is formulated, and custom varies. In Congress it is usual for the chairman of a committee, or some member thereof in charge of a bill to open the discussion with a detailed explanation of what is proposed. This is the natural course where few measures go along easily, and controversy is the normal expectation. In the Legislatures there is much more of smooth sailing and the tendency is to refrain from inviting trouble by an explanatory speech before objection shows itself. Therefore, usually the first speech is made in attack. Sometimes the opposition will try to escape this, but it is a dangerous course, for if nobody rises to oppose and the friends of the measure are shrewd enough to keep still, the measure is likely to go through with a rush. Not infrequently have chances to defeat been thrown away in this fashion.

The physical conditions of argument much affect its character. In Athens the speaker's stand was a sacred place, and the orator never ascended it without wearing on his head the crown of leaves or flowers customary when one performed a solemn religious act. The stage or platform at Rome whence orators addressed the people was known as the *rostra* because after the great Latin war it was adorned with the beaks (*rostra*) of the ships taken from the Antiates. It lay between the Comitium, or place of

meeting of the curiæ, and the Forum, or place of meeting of the whole people, so that the speaker might turn to the one or the other. Close by was the *tribunal*, where sat the magistrates. Two etymological blunders have come from these names. It is inexact to call the speaker's pulpit either a "rostrum," which is the singular of "beak," or a "tribune," for the "tribunal" was the justice-seat, not the place for oratory. However, "rostrum" and "tribune" are now so thoroughly embedded in the language that to complain of them would be pedantic.

Probably on the French rests the responsibility for "tribune," the customary name for the pulpit-like stand whence speakers address a French assembly. The use of the tribune has the advantage of giving everybody an equal chance to be heard, and therein gains over the practice that restricts the speaker to the neighborhood of his desk, for the location of the desk may make much difference in the matter of getting a hearing. The German Reichstag happily combined the two systems by permitting a speaker to talk from the tribune or his seat, as he pleased.

The serious objection to a tribune is that it encourages long and formal speeches, and at the same time discourages the colloquial style of debate that modern judgments hold to be most effective. The closer a speaker is to his hearers, the briefer and more matter-of-fact he is likely to be. This is not the least of the reasons why it has been contended that desks are undesirable in the larger legislative assemblies. They have never been permitted in the House of Commons. Agitation for their removal from the House of Representatives at Washington was begun as early as 1840, but did not succeed until 1859, and then the experiment was quickly abandoned. It was a time of tense and intense bitterness, the slaveholders making their last struggle for domination. During the strife and turmoil of the days while the Speakership was hanging in the balance, the close contact of the new seating arrangements provoked rather than discouraged hostile demonstrations, made threat and menace easier.

Perhaps this was one reason why by February a majority of the House had reached the conclusion that the change had not been advantageous, and a resolution to remove the benches and restore the desks was agreed to, 95 to 86. A minority of the select committee on the subject held the chief argument for retaining the desks to be the strongest reason for their abolition, namely, the convenient facility they gave for writing letters and

franking documents. The first duty of the Representative was to attend to the business going on in the House. The space occupied by the desks was so great that the members speaking and the clerk reading could not be heard readily, and much time was lost in the repetitions and misunderstandings resulting. The minority of the committee was confident the change would tend to produce quiet, orderly debate, real, legitimate discussion of the subject-matter, and in time a change in congressional oratory, eliminating the prosy manuscript speeches and the orations for the constituencies. Among those who opposed the return to desks were George H. Pendleton, Henry Winter Davis, Galusha A. Grow, L. Q. C. Lamar, Justin S. Morrill, John Sherman; for the desks were Charles Francis Adams, Schuyler Colfax, Roscoe Conkling, Thomas Corwin, Henry L. Dawes, William S. Holman, John A. Logan, William Windom, Cadwallader C. Washburn. In the course of another half-century the growth of membership produced so many inconveniences by reason of the desk system that it was again discarded.

The use of desks facilitates the grouping of party members and there are those who think this a benefit. In Parliament, where there are no desks, it is made easy by the shape of the hall, the benches on the long sides permitting the two parties to face each other. For a long time there was no grouping in Congress. When that body first assembled, George Washington had been unanimously chosen President and parties had not shaped themselves. The practice of having members take desks on the first-come-first-served plan prevailed until the House became so large as to make the choice of seats important, and then assignment by lot became necessary. Since desks have been removed, members have been at liberty to sit where they please. Habitually the members of one party sit on the right of the middle aisle, of the other on the left, but nobody is frowned at if he goes visiting among his party opponents. My impression is that in most of the State Legislatures there is no party grouping. None is attempted in Massachusetts and its absence conduces toward tempering the spirit of partisanship. Assignment by lot does not wholly prevent some measure of choice, for exchanges are common after the drawing, sometimes for a money consideration, which on principle is to be deplored, but in practice helps to get fit locations for some of the men who ought to have places suited for the most effective speaking. The man who wants to make his words ef-

fective is fortunate if he draws or otherwise gets a seat at the side, or in front, for then he can face all of his audience. It is distressing to be forced to pivot when speaking, and the necessity much lessens effectiveness. Novices think that as they address Mr. Speaker, they ought to face him while talking. That is quite needless, and the sooner a new member stops doing it, the quicker will he get control of his audience. You must look at those you want to convince.

It has not always been the custom, and is not to-day the invariable practice, for members to speak standing. Heywood Townshend, a member of the Parliament of 1601, gives us a side-light on a Committee of the Whole of his day. After certain remarks by Sir Walter Raleigh, "Sir Edward Hobbie said, We cannot hear you speak out; you should speak standing so that the House might the better hear you. So Sir Walter Raleigh said that being a Committee, he might speak either sitting or standing, and so repeated over again the former Speech. Mr. Secretary Cecill said, Because it is an Argument of more Reverence, I choose to speak standing." One of the rules adopted for the Pennsylvania Assembly of 1703 read: "That all Members, offering to speak, stand up and direct their Speech to the Chair, speak pertinently to the Occasion, and having ended sit down." The inference is that members needed the admonition to stand. Just as interesting is it to gather that they needed to be told to sit down when they had ended. Would that such a precept might be enforced to-day! The whole rule is admirable. Nothing ever better told the duty of the debater. If only men would "speak pertinently to the Occasion, and having ended sit down," life would lose half its terrors to audiences.

In the Congresses of Argentina and Chile, members speak without rising. It is said this gives to the proceedings an informality that has advantages. Yet the practice must badly hamper some useful and legitimate adjuncts of speech. Gesture helps to hold attention, and when used by a master supplements the tongue by clarifying and emphasizing language. To articulate when seated, so that the voice will be distinctly heard in a large chamber, is a physical task of no small dimensions. It is much less fatiguing to talk audibly and forcefully when erect. Furthermore, the sight of the whole body, from head to feet, somehow gives a sense of personal relationship between speaker and audience that leads the skilled orator to dispense if possible with

even the barrier of a desk. It is for this reason that clergymen would find themselves more effective if they would not keep behind a pulpit. Likewise in a legislative chamber, the man who intends to speak at any length and wants to make the most use of his opportunity, will leave his desk and speak from the area in front.

Reading and Reciting

The practiced speaker will not interpose even so much as a sheet of paper between himself and his audience, save on exceptional occasion. Speaker and audience must look each other in the face if the mysterious bond of sympathy is not to be broken. That is one reason why it is unwise to read a speech. Another is the loss of that impression of spontaneity which helps so much in winning favor. Men like to watch the workings of the mind when it is creating. Whatever is read is apt to be stale and flat; the effervescence is gone. A written speech smells of the lamp. It runs the risk of being ponderous, didactic, soporific. Its delivery is usually monotonous, for only the most expert can read and at the same time supply emphasis, modulation, gesture, and other desirable accompaniments of the spoken word.

Many a novice, mistrusting himself, yields to the temptation to write and read. It is a fatal mistake. The poor speech spoken is better than the good speech read. Yet in that dreadful moment before the first words are to be uttered, who has not at times longed for a manuscript? Then it seems beyond the range of possibility that the right words will come. Surely the ideas will not fall into proper order. The vital points will be forgotten. Wretched failure leers at you. Yet somehow when the tongue has been loosened, along come the words and the ideas, trooping like trained soldiers. Some of them are strangers. Whence they came, you can't imagine. Some are old friends, whom you have not met in months or years. A couplet, an epigram, a quotation, welcomed by the mind long ago and thought to have departed after brief visit, proves to have been dwelling in some brain cell all that time and now ready to repay the hospitality.

Perhaps a psychologist would explain the riddle of it all by saying that under the stimulus of contact with an audience, and impelled by something like telepathic influence, the speaker exerts an abnormal power that enables him not only to marshal the ideas on the surface of the brain and equip them with words,

but also to reach down into the subconscious region and from that wonderful storehouse draw out resources placed there little by little through all the days of life. If this be sound theory, the best speaker, other things equal, will be the man who has most listened and read and studied, for his treasury will contain the most gold.

Let it not be supposed, however, that it is safe to rely on an ancient hoard. That helps, but it does not suffice. Fresh material must furnish the groundwork. Therefore some degree of recent reflection and planning is necessary. It is prudent to have well in mind an outline of the argument, perhaps jotting down the heads of it on paper. Where it is of vital importance to remember them all, consulting the synopsis while speaking may be the only safe course, but the less of that the better. Every time you take your eyes from the audience, you lose your grip, and as a rule you do not gain enough to offset the loss. Better speak the speech as it comes and run your chances of forgetfulness.

The reading of speeches is particularly inappropriate in a law-making body. There the purpose of speech is discussion, and this means more or less reference by each speaker after the first to the arguments presented before. It is by attack and defense that the question should proceed to decision. Then, too, there is something in what Fox said, that "if the practice of reading written speeches should prevail, members might read speeches that were written by other people, and the time of the House be taken up in considering the arguments of persons who were not deserving their attention." To my mind, though, the important thing is not that the real author may be of no account, but that the pretended author, the reader, may by this deception deprive the assembly of that expression of personal judgment to which the assembly is entitled. It has a right to expect that views advanced will have been the product of the observation, reflection, and experience of the fellow-member presenting them.

These considerations have made it the general rule in Parliament that speeches shall not be read. Such has not always been the case. "In ancient times," observed Sir William Coventry, "but a few persons spoke in the House, and their speeches were ready penned. The powder and shot was ready made up into cartridge; ready cut and dried, and a man had then time to think; but now we speak on a sudden, and therefore would have some grains of allowance given." This was spoken in 1676, so that we

may suppose the practice had changed not many generations before. The chances are that spoken discourse became the custom with the revival of activity in Parliament under James I. Apparently, however, reading with permission was long allowable, for Jefferson found the practice to be that "a member has not a right even to read his own speech, committed to writing, without leave." Soon afterward Speaker Abbot ruled squarely against it. His diary has the entry:

"May 14, 1806. Mr. Jeffery having read a long *written* speech without interruption, I mentioned it to Mr. Fox, toward the end of it, and also to Mr. Canning, that I should take notice of this impropriety, which they severally agreed to be highly proper to do; and accordingly, before putting the question, I called the attention of the House to it, and stated this to be a practice contrary to the received and established usage of debate, and necessary to be remarked upon, lest it should grow into a precedent. To which interposition the House entirely assented."

In the Massachusetts Convention of 1820 James Prince of Boston, saying he was unused to public speaking, read a speech, and after he sat down, the Chairman (of the Committee of the Whole) said, that as the organ of the committee, he would observe it was contrary to the rules of deliberative assemblies to read written speeches. Josiah Quincy differed from the Chairman, saying it was a right that every member should be permitted to exercise, and he appealed from the decision, whereupon the Chairman said he did not mean to make a decision, but a suggestion merely, and the matter went no farther.[1]

The great orators of the United States Senate in the Jacksonian epoch made their reputations without the use of manuscript, but since their day the rule of Parliament has been thrown to the winds and the reading of speeches has become common. The lapse seems to have taken place in the Civil War period. James Parton, writing in 1870, said a distinguished Senator had remarked in conversation the previous winter that when he came to Congress, fifteen years before, "not more than one speech in five was written out and read, but now four in five are." One of the strong men who lost in reputation by this was Charles Sumner. It was his early custom to commit his productions to memory, whereby he was able to add to the force of arguments perfected at leisure, "all the grace and art and fire of

[1] *Debates of Convention of* 1820, p. 167.

oratory of which he was so consummate a master." [1] The exacting duties of his public service compelled him to give up the laborious practice of memorizing and, except in running debate, to deliver from manuscript whatever he had prepared at any length. Anthony Trollope heard him on the Mason-Slidell affair. "On such an occasion," says Trollope, "a speaker gives himself very little chance of making a favorable impression if he reads a speech from a written manuscript. Mr. Sumner did so on this occasion, and I confess I was not edified." [2]

Sumner himself would probably have defended his change in habit on the ground that speeches in the Senate had ceased to be addressed to the immediate audience, but by reason of the invention of the telegraph and the improvements in the printing art were delivered to the whole country, with redoubled need for careful preparation and accurate statement. Indeed he brought this out when speaking in the Senate, December 14, 1869, on the occasion of the death of William Pitt Fessenden. "The Senate," he said, "has changed much from its original character, when shortly after the formation of the National Government, a Nova Scotia paper, in a passage copied by one of our own journals, while declaring, that 'the habits of the people here are very favorable to oratory,' could say, 'There is but one assembly in the whole range of the Federal Union in which eloquence is deemed unnecessary, and, I believe, even absurd and obtrusive — to wit, the Senate, or upper House of Congress. They are merely a deliberative meeting in which every one delivers his concise opinion, one leg over the other, as they did in the first Congress, where an harangue was a great rarity.' (Gazette of the U.S., Phila., Dec. 31, 1791.) Speech was then for business and immediate effect in the Chamber. Since then the transformation has proceeded, speech becoming constantly more important, until now, without neglect of business, the Senate has become a centre from which to address the country. A seat here is a lofty pulpit with a mighty sounding-board, and the whole wide-spread people is the congregation." [3]

Senator Dawes, writing in 1894, thought the practice of reciting from memory was passing out of use, and believed it seldom resorted to by any noted speaker at that time. He recalled it was the method of Edward Everett during his entire public

[1] Henry L. Dawes, "Has Oratory Declined?" *Forum*, October, 1894.

[2] *North America*, 331. [3] Charles Sumner, *Works*, XIII, 191.

life. Everett's last great oration, on Washington, was at home while he was reciting it in all parts of the country, from memory, with all the grace and eloquence and polish of diction that had been fashioned and put upon paper with care in his own study. There can be no doubt that this is the way to make an oration a work of art, and he who would win more than passing fame as an orator may not avoid the fatiguing labor it involves. For the purposes of public debate, however, it is not the best course. He who relies on memory will be quite unequal to the quick turns that discussion takes. His argument will not be responsive. What he gains in delighting his hearers, he will lose in convincing them. Then, too, the practice of writing and memorizing speeches gives no training in self-command, swift adaptation to circumstances, the power to think rapidly and at the same time clearly. The essay prepared in the library helps a man little toward becoming a leader of men. To achieve that distinction he must by much practice learn to meet their vanities, foibles, prejudices, and passions face to face, controlling them by words that seem to spring unbidden to the tongue.

In some respects the task of persuading a legislative body resembles that of persuading a jury. By reason, though, of one important particular the problem of the debater is much harder than that of the attorney. Jurymen are presumed to know nothing of the case, to have formed no opinion, to have minds blank as the driven snow. Legislators, on the contrary, usually have more or less knowledge of the issue, are permitted and even asked to hear in advance the opinion of the public, and where party principles may be involved are presumed to have minds not wide open to conviction. This makes argument in a law-making assembly far more complex than in a court-room. The debater must often face indifference. He must persuade or convince men prejudiced or hostile. Furthermore, he must win a hearing from men usually surfeited with oratory.

All the conditions call for quick thinking on the spot. But this does not mean avoidance of preparation. He speaks best who is filled with his subject. The more he has thought on it, the better the speech is likely to be. A really admirable speech often takes thirty or forty years in the making.

There is, however, such a thing as being overburdened with knowledge, not for the purposes of any one speech, but because of the temptation it gives to speak on too many topics. Every

legislative assembly has its traditions of men profoundly learned who have thrown away their influence by talking too much. Almost as wearisome as the affectation of omniscience is an approach to that quality. The learned bore is one of the most obnoxious of bores.

Technique of Discussion

When Sir Thomas Smith described the Parliament of Queen Elizabeth's time, he said, "though the one do praise the law, the other dissuade it, yet is there no altercation. For every man speaketh as to the Speaker, not as one to another, for this is against the order of the House." It would be interesting to know how and when it was discovered that in any assembly better results are secured if men do not directly address each other in argument. Just why that is the case would be hard to say, but it certainly is. The less numerous the assembly, however, the less important the practice, which may be the reason why in the House of Lords, where attendance is seldom large, it has not been adopted. Possibly there the reason for its absence is the comparatively insignificant status of the presiding officer, yet the tendency toward direct colloquy is found in all small bodies. Vice-President Fillmore in 1850 had occasion to remind the United States Senate of the rule.

At the same time he cautioned the Senators against the practice that had grown up of interrupting a Senator when speaking, instead of addressing the chair. The unwisdom of this also was early recognized. At a Massachusetts General Court, September 3, 1634, it was ordered, "that if any member of the Court shall begin any speech, while another is speakeing, to interrupt the former, hee shall forfect ij s. vi d. for every offence." [1] One of the rules adopted by the Virginia Assembly at the opening of the session of 1658–59, said: "Upon debate of anything proposed by the Speaker, the party that speaketh shall rise from his seat and be uncovered during the time he speaketh, wherein no interruption shall be made until he have finished his discourse, upon penalty of one hundred pounds of tobacco." To the same effect was the rule of the Pennsylvania Assembly in 1703: "That none presume to interrupt one another, nor offer to speak until the first sit down." From the presence of such provisions among rules not numerous, it is to be inferred that a practice, found by

[1] *Records of the Colony of the Mass. Bay in N.E.*, I, 128.

experience to be most salutary, had been frequently neglected.

Of kindred antiquity is the rule that members shall not address or refer to each other by name. This had been found desirable at least as early as the sixteenth century, for Smith tells us: "It is also taken against the order to name him whom ye do confute but by circumlocution, as he that speaketh with the bill or he that spake against the bill and gave this and this reason. And so with perpetual oration not with altercation he goeth through till he do make an end. So that in such multitude and in such diversity of minds and opinions, there is the greatest modesty and temperance of speech that can be used." It was not until the eve of the Reform Act that in Parliament members came to the simple practice of referring to each other by the use of the names of their constituencies. Up to that time another was referred to by his title, or his place in the House, or as the gentleman that spoke last, or with some like circumlocution. The Pennsylvania rule of 1703 was: "That the members avoid naming others when they have Occasion to observe or take Notice of their Speech, but have respect to the Time of their Speaking, or to the Seat they have, as Right or Left of the Chair, &c."

This, too, is a valuable practice that may be neglected, especially in small bodies where acquaintance becomes close, such as a Senate. In 1909 Vice-President Sherman found it necessary to remind two experienced United States Senators that they were forgetting the rule. Thereupon Senator Bacon said: "It is an extremely important rule in parliamentary practice; one not only conducive to decorum in debate, but absolutely essential to decorum in debate; and I take advantage of the opportunity presented by the suggestion from the Chair, not only to plead guilty myself, but to ask the attention of other Senators to it. The fundamental rule in parliamentary intercourse is that Senators should only be addressed in the third person, and should only be spoken of in the Chamber in the third person; and it is a safeguard against asperities in debate and personalities of all kinds. I take advantage of the opportunity to say what I do, because I myself am sometimes an offender. I remember that once a former Senator from Massachusetts, Mr. Hoar, who bore a very distinguished part in the annals of this Chamber, was calling attention to the same thing, and in doing so he used this expression, that there was but one 'you' in the Chamber, and that was the presiding officer; that 'you' could be applied to the

Senators as a body and to the presiding officer as a representative of the body in its entity; but that it could never under any circumstances be applied to an individual Senator; and I trust, Mr. President, that I may be excused for emphasizing the very timely suggestion of the presiding officer in regard to this matter."

The House of Commons conforms strictly to etiquette in its modes of address and personal reference. The Speaker is always addressed as, "Mr. Speaker, Sir." The Chairman of a Committee of the Whole, however, is addressed by his own name. In referring to a member it is customary to speak of "the honorable gentleman" or "my honorable friend," or "the Right Honorable the Chancellor of the Exchequer." Lawyers are often referred to as "honorable and learned," while officers of the army and navy are invariably styled "honorable and gallant." This custom, says Michael MacDonagh,[1] undoubtedly tends to keep the standard of debate on a high level of order, courtesy, and dignity, but it has sometimes led to odd results. In the course of the Parliament of 1886-92 two members were ignominiously expelled from the House after conviction for grossly immoral offenses; and yet in the discussion on each occasion the criminal was still punctiliously described as "The Honorable Gentleman." W. H. Smith, who was not a lawyer, was once referred to in a speech as "the Right Honorable and Learned Gentleman." "No, no," exclaimed the simple old gentleman — not without a touch of humor — disclaiming the distinction amid the merriment of the House, "I beg the honorable gentleman's pardon; I am not learned."

Our grandfathers were more punctilious in little things than we are. For instance, nobody in the Massachusetts Convention of 1917 would have thought of complaining about such a remark as that which brought annoyance to Josiah Quincy in the Convention of 1820. Mr. Quincy found occasion to say he wished "the venerable gentleman on the right of the chair [John Adams] to whom nature had left, at the age of 86 years, the unabated vigor of his intellect, had also been permitted to have retained the unabated powers of his ancient eloquence and voice; he wished that every gentleman in the Convention could have heard him [Mr. Adams] say, as he had yesterday, that gentlemen did not realize the consequence of the measure." Here a member

[1] "The Quaint Side of Parliament," *Nineteenth Century*, February, 1898.

called Mr. Quincy to order on the ground that it was not in order for one gentleman to state what another had said. Mr. Quincy replied that he had no authority to repeat what the venerable gentleman had said, but presumed, as he was present, it was in order. The Chair (Chief Justice Isaac Parker) decided against him, whereupon Mr. Quincy said that although he differed from the Chair, yet he had too great respect for the gentleman who filled it, to appeal.[1]

No loss has resulted from the disappearance of such finical refinements, but this cannot be said of the tendency to forget a reasonable convention like that which forbids reference to the personality or conduct of the Chief Executive. More than three centuries ago Sir Thomas Smith, describing Parliament, said: "If any speak unreverently or seditiously against the Prince or the Privy Council, I have seen them not only interrupted, but it hath been moved after in the House and they have sent them to the Tower." We have not precisely the same reasons in theory for finding offense in speech of the same sort, but none the less are there potent reasons for its prohibition. No branch of government can abuse the others without suspicion of insincerity. All such abuse tends to react to the harm of government as a whole. Each branch is responsible only to the people unless there is occasion for impeachment. The amenities, the decencies, call for self-restraint.

The wisest course is to refrain from all reference not purely official. Such is the practice in the Massachusetts Legislature, where in debate mention of the Governor would be peremptorily held out of order, unless in connection with a message from him. In the Connecticut House of 1891 a member referred to the Governor as an "intruder and usurper." The point being made that the language was unparliamentary and disrespectful, Speaker Paige ruled it well taken. Congress seems to have been able to preserve the proprieties for many years, but the bitterness against President Johnson broke down the barriers. When Elihu B. Washburne denounced a message from Johnson as "a disgrace to the country and to the Chief Magistrate" who had sent it, Speaker Colfax ruled: "This being a country of free speech, the Chair thinks that members who have been elected to represent the people of the United States have the right to criticize the official conduct of those who are clothed with public

[1] *Mass. Convention of 1820*, p. 118.

trust, provided that it is done in language not indecorous or personally offensive." He seems to have thought that as the President had criticized, Congress might answer back. Since then debaters in Congress have gone far in their discussions of the Chief Executive — to my mind unfortunately.

Certain niceties of debate observed in Parliament get little if any observance in American assemblies. For instance it is out of order in the House of Commons to refer to previous debates, nor is it permitted to criticize previous action, of the same session. The reason for this is that each vote ends the discussion and is binding. To refer to the matter again would be to open wounds that might better be left to heal. Of course this does not apply to previous stages of the pending matter.

Another prohibition in Parliament that is rarely invoked on this side the water is aimed at the introduction of outside influence or the wasting of time or the dulling of debate by the reading of anything printed or written. Formerly the member of the House of Commons who started to read from a letter, newspaper, or book would be sharply called to order. In recent years the strictness of the rule has been relaxed, but any abuse of the patience of the House would not be there permitted as it sometimes is in the United States. Once Charles Sumner was called to order by a fellow Senator for reading an irrelevant paper, having no reference to the subject under discussion. However, the President (Mr. Pomeroy in the chair) overruled the question of order and on appeal was sustained.

Irrelevant talk brings to presiding officers one of their most bothersome perplexities. Of course the general rule should be that speakers must confine themselves to the question immediately before the assembly. Yet from earliest times the policy of exceptions to the rule under certain conditions has been recognized. A Roman Senator had no right to give his opinions unasked by the presiding magistrate, for the Senate was ever viewed as a council of advisers; but when a Senator had been asked his opinion on the matter in hand, it was his right to say first whatever he pleased on any other topic. So the Senator would rise, unburden his soul of cherished views on matters alien to the debate, and then make his speech conform to the rules of the house by concluding with a formal opinion on the direct issue put before it by the magistrate.[1]

[1] A. H. J. Greenidge, *Roman Public Life*, 267.

In England the Speech from the Throne at the opening of a session of Parliament came to furnish the occasion for miscellaneous oratory, and in imitation thereof the President's Message served the same purpose in Congress for half a century. Our fathers, however, did not find herein excuse enough for escaping the rules about relevancy, and so in the course of time they got in the way of using for a free field the Committee of the Whole on the state of the Union. This is the guise the House assumes when it considers bills involving the raising or spending of money. Presumably with some hazy notion of applying the English theory that the redress of grievances must precede supply, Representatives began to think it eminently proper in this Committee to talk about whatever they pleased. In 1826 a member was called to order for indulging such a belief and the ruling of the Chair against him was sustained on appeal, but apparently after that greater latitude was gradually allowed. The practice of irregular discussion in connection with a variety of bills was said to be not uncommon when in 1840 another wanderer was called to order. In the next year, when Brown of Tennessee wanted to know if they were to be detained "by discussing everything under the heavens," the Chairman said the offending member must confine himself to the provisions of the bill, but in 1849 another Chairman held that, according to the universal usage, when the House was in Committee of the Whole House on the state of the Union, all manner of matter was debated. The freedom of discussion had been found valuable, and from that day to this it has been thought worth while to permit what is known as "general debate" in the Committee of the Whole House on the state of the Union.

The valid criticism against "general debate" as it is now conducted is that it greatly wastes time and does much of indirect damage through not being properly systematized. Indeed it is to-day perhaps the most grievous element in the procedure of Congress. Why the House endures the loss of hours and the dislocation of work produced by the invasions of "general debate" is a lamentable mystery. Doubtless in the great national forum there should be opportunity to discuss political issues and the larger administrative problems apart from a definite proposal for legislation. The trouble is that this discussion is now injected into debates that ought to be exclusive — with woeful effect on attendance and interest. The simple remedy would be to for-

get any ancient justification, and with only present considerations in mind relegate this class of debate to a specified time, say the first hour of each day or of certain days in the week.

In the other Committee of the Whole, that of "the Whole House," it has been ruled that the member must confine himself to the subject, and in the House sitting as a House, that is also the ruling. This undoubtedly conforms to the principles of parliamentary law. To be sure, John C. Calhoun, presiding in the Senate, steadily refused to interrupt the rambling, incoherent maunderings of John Randolph when the mind of that erratic genius had begun to give way, but Calhoun's peculiar view of a Vice-President's functions has not been taken by his successors, and now it is established that any presiding officer is to enforce relevancy upon demand, save under the exceptional conditions of "general debate." Whether a presiding officer should take on himself the responsibility of interference without being called upon by a member is a more difficult question. In the Georgia Senate and House he shall, the rule says, "in his discretion suspend irrelevant debate." No such rule elsewhere has come to my notice. In any case a presiding officer would hesitate to take the initiative, but a courageous man in the chair can save a House much time if he will assert the authority.

In Congress there is, always has been, and doubtless always will be much talk not clearly irrelevant that is meant for the public rather than for the immediate purpose of the debate. It is said that about 1820 Felix Walker, a Congressman from Buncombe County, North Carolina, explained that no importance need be attached to his remarks in that he was "only talking for Buncombe." The phrase has given our language a word with wider significance than its origin quite justified, for "buncombe" now carries the idea of nonsense and for all I know Felix Walker may have been delivering a very sensible speech. It is not wholly fair to denounce the example he set, for a legitimate function of legislative debate is to influence public opinion as well as the votes of the immediate audience. Of course this function can be grossly abused, but something is to be said for it when it is kept within proper bounds.

In Congress the attendance upon "general debate" has become so ridiculously small that members hungry for a hearing are more and more invading debate under the five-minute rule with irrelevant discussion. They get the chance by use of the

wholly artificial and somewhat absurd device known as the *pro forma* amendment. The man who wants to interject something foreign will move to strike out the last word of the paragraph under consideration, or the last two words, or will go through the form of opposing such a motion. Martin B. Madden, a level-headed Representative from Illinois, drew attention to this in the House January 6, 1920, deploring the tendency and giving figures to show its effects. He had found that in the long sessions consideration of three of the appropriation bills under the five-minute rule had taken four and one-fifth days in the 57th Congress; four and one-fifth in the 58th; ten in the 60th; sixteen and one-half in the 62d; nineteen and three-fifths in the 63d; twenty-two and one-half in the 64th. After that the war made conditions abnormal. He thought that most of the debate had come to be foreign to the pending question and believed the "liberalizing" had gone much too far.

Another of the embarrassments of presiding officers rises from the problem of preserving order during debate. It may surprise even skilled parliamentarians to learn that it is not certain whether or not any duty in this regard exists. When Sir Spencer Compton was Speaker of the House of Commons, it is said he used to answer a member who called upon him to make the House quiet, for that he had a right to be heard: "No, Sir, you have a right to speak, but the House have a right to judge whether they will hear you." Hatsell thought that in this the Speaker was certainly mistaken; "the member has a right to speak, and the House ought to attend to him, and it was the Speaker's duty, for that purpose, to keep them quiet." Yet Hatsell went on to say that "where the love of talking gets the better of modesty and good-sense, which sometimes happens, it is a duty very difficult to execute in a large and popular assembly." The fact is that such an assembly cannot be coerced into listening. However, it will be observed that when the adage says, "You can lead a horse to water, but you can't make him drink," it admits the power to lead him to water, and it would now be generally admitted that such is the duty of the Speaker. The Chair ought to ensure the opportunity to be heard. On the other hand, men have a right not to be bored to death.

In this conflict of rights, the many have had their way in the House of Commons by means doing no credit to the generosity or charity of Englishmen. They devised the expedient of warn-

ing a tiresome speaker by a significant coughing and scraping. If he did not heed the warning, a tempest drowned his voice. If he appealed to the Chair, he was advised to yield to the temper of the House. After like fashion a hundred years ago members of Congress used to try to bring a garrulous debater to a conclusion by coughing, scraping with their feet, and banging desk covers. Fortunately more decent methods of suppression are now the rule.

It would be interesting to know how men happened to agree upon the hiss. It would also be interesting to know upon how many occasions the angered orator has retaliated with the reminder that geese hiss, and has received the retort that geese saved the Capitol at Rome. The convention is at any rate very old. As early as March 26, 1604, in Parliament a Mr. Hext moved "against hissing to the interruption and hindrance of the speech of any man in the House."

Perhaps some deductions about changes in human relations, if not human nature, are to be drawn from the fact that as noisy disapproval in legislative bodies has lessened, noisy approval has increased. In 1801 a spectator in the gallery of the National House who applauded by clapping his hands was, by direction of the Speaker, taken from the gallery and kept in confinement by the Sergeant-at-Arms for two hours. In 1836, in the course of a session of the Committee of the Whole, a spectator in the gallery applauded, whereupon the Committee rose, its Chairman communicated the momentous information to the Speaker, the Speaker ordered the Sergeant-at-Arms to clear the gallery, and a veteran member proposed that a warrant be issued for the arrest of the offender, but happily this terrible project was not carried into effect. In the later history of the House, applause from the gallery has been viewed with less alarm, and though repressed as a matter of form, no great strictness in the enforcement of the rule has been attempted. Spectators in the House galleries nowadays very rarely applaud.

Henry L. Dawes, writing in 1894 of the members themselves, said the habit of greeting orators with applause was of recent origin in this country and especially in Congress. He thought it was having a marked effect upon the character of the oratory of legislative bodies. "It has come to be the daily food of the orators of the House," Mr. Dawes continued, "and every speaker seems to measure his own success by the volume of it which he is

able to elicit. Party friends also are always ready to make sure that he does not, in this regard, fall short of any opponent who has preceded him. The consequence is that the temptation to prepare speeches for this effect is too strong to be resisted, and the orator studies all the arts and methods and tricks of diction most calculated to call forth sudden and unrestrained manifestations of approval. The direct effect has been to bring the speaking of legislators to the level of stump oratory on the prairies where applause serves to fill the sails of the speaker and toss him about as the wind does a dory at sea. One will look in vain for true and genuine eloquence in any length of oration delivered under such influences, punctuated though it be with parenthetic outbursts of uncontrolled applause all carefully recorded. The effect upon the character of public speaking has been a great increase in quantity, but a failure to elevate or even sustain the standard of the past in any of the qualities which constitute real oratorical power and true eloquence."[1]

There may have been some growth of applause in the Massachusetts Legislature, but it has not become a serious matter. Very rarely do spectators applaud. Members occasionally thus approve an exceptionally good speech. Thereupon the Speaker somewhat perfunctorily pounds with his gavel, when the clapping is about over. No traces there appear of such malign influence as Mr. Dawes discovered in Congress, nor in Congress itself has that influence struck me as really serious. As a matter of fact, within bounds applause does no harm. Nothing is to be said in its defense if it is given to approve or emphasize argument, for that is not a legitimate attribute of parliamentary debate, but if it is no more than kindly commendation for the manner of delivery, or a tribute to intellectual effort, why begrudge it? Whatever encourages and stimulates men to do their best cannot be wholly unwise. Better praise than blame, anyhow. Better the hand-clap than the hiss.

A rule in each branch of the Georgia Legislature requires that applause or hisses in the galleries or lobby in the course of any speech or legislative proceedings shall be promptly suppressed. Doubtless elsewhere that would generally be the policy of the presiding officer. Whatever may be said for approval of a member by other members, it is most impolitic to permit it from spectators, for from them it can hardly fail to be addressed to matter

[1] "Has Oratory Declined?" *Forum*, October, 1894.

rather than manner, with the possibility of influencing votes. Furthermore, the common phrase, "talking to the galleries," with its familiar implications, makes argument against the practice unnecessary.

By the way, speaking of praise and blame suggests that the novice may find some profit in a word of caution about the danger of fault-finding. Nobody enjoys being blamed, and legislators are as human as anybody else. Many a member's influence has been badly damaged by a censorious speech. He who lectures a House on its shortcomings will sooner or later get punished for it, and usually more than he deserves. The cheerful legislator makes the most headway. This does not mean levity. A lawmaking assembly may enjoy being amused, for

> A little nonsense now and then
> Is relished by the best of men.

But the member who does not take himself or his fellows seriously runs great risks. It is for this reason that humor is dangerous in debate. Repartee is welcomed, and all the more if it is really witty. The man who can make a happy retort is thrice fortunate. Story-telling is quite another matter. An occasional anecdote very pertinent to the argument may help and do no harm, but the man who gets a reputation as a humorist might as well decline re-election and turn to some other occupation if he wants to be of genuine service to mankind. The rare exceptions, such as Thomas B. Reed, do not disprove this. Commonly the serious, earnest men go farthest in public life.

Number and Length

Although the rule restricting the number of times a man may speak on any one subject would now be generally looked upon as having for its primary purpose the saving of time, that was not its original purpose, if we are to accept the explanation of Sir Thomas Smith. Describing Queen Elizabeth's Parliaments, the invaluable Sir Thomas said: "He that once hath spoken in a bill, though he be confuted straight, that day may not reply, no though he would change his opinion; so that to one bill in one day one may not in that house speak twice, for else one or two with altercation would spend all the time. The next day he may, but then also but once." When Sir Francis Seymour was checked in 1621, it was "because against the order of the House to speak

twice in one day; which is for avoiding replies, and spending of time, and to avoid heat." This would indicate that the avoidance of wrangling was the uppermost thought. Doubtless, too, it was desired to suppress that failing of human nature which leads men to want "the last word" in a dispute. It is not wholly a weakness, though, but in part a shrewd wish to take advantage of the fact that there are listeners with whom the last word has the most weight.

The rule appears to have been well enforced in those days, but maybe not to the strict limit of one speech, for we find that when Sir Francis Bacon was ruled against, May 14, 1604, it was for trying to speak a third time. That, however, may have been the second day of the debate. As time went on, laxity grew in this matter and others as well, so that Hatsell, who published the second volume of his "Precedents" in 1781, could complain therein (pp. 167, 168): "It is very much to be wished, that the rules, which have been from time to time laid down by the House, for the preservation of decency and order, in the debates and behaviour of Members of the House, could be enforced, and adhered to more strictly than they have been of late years. . . . The neglect of these orders has been the principal cause of the House sitting so much longer of late years than it did formerly. Members not only assume a liberty of speaking beside the question, but under pretence of explaining, they speak several times in the same debate, contrary to the express order of the House. And though, as is said on the 10th of November, 1640, any Member 'may,' yet Mr. Speaker 'ought' to interrupt them."

Like many other provisions of English parliamentary law, this one limiting the number of speeches crops up early in the assemblies of colonial America, but with the usual uncertainty as to whether it was directly copied or the natural product of like conditions. From the fact that it was a decade after the Massachusetts General Court began, before a rule on the subject appears, one is tempted to imagine that it was a normal response to a plague of disputatious loquacity. The order of October 7, 1640, read: "No man in the Generall Courte shall speake above three times to any cause without leave from the Governor or Court upon paine of 12d. a time."[1] How often nowadays would a man delightedly pay twelvepence for one more chance to riddle the other fellow!

[1] *Records of the Colony of the Mass. Bay in N.E.*, I, 304.

Four years later the rule was made more liberal in some respects, the House of Deputies ordering, May 31, 1644, "that noe member of this howse shall speake twice to one case att one time, beefore every one (that will) have spoken to ye buisnes in hand, & after some pawse, to see if any other will speake, & it is att ye libertie of any to speake agayne with leave from ye howse." [1]

In Virginia also it was the custom to enforce parliamentary law with penalties. The fine provided by the rule adopted for the House of Burgesses in September, 1663, forbidding a member to speak more than once on a proposition, was twenty pounds of tobacco. Here the purpose was set forth, "that every one may have liberty to declare his judgment and the confused multitude speaking at once be avoided." [2] The Pennsylvania rule of 1703 was, "none to speak above twice in one Matter (especially upon Bills) without leave of the Speaker." Even in those times, it will be observed, the Speaker had the chance to be a czar. Why there was especial need of the rule in the matter of bills, must be left to conjecture. The Continental Congress that met in Philadelphia in September, 1774, was more judicious in following the Massachusetts example, for it said: "No person shall speak more than twice on the same point without leave of the House." That the assembly itself shall determine whether it wants to hear a man again, is to-day the established practice.

The rule for the previous question now universally prevailing in the lower branches of the State Legislatures makes this matter no longer of consequence to them, but in the Senates it still has occasional importance. Nearly half of the Senates limit the number of times a Senator may speak. Most of them give him two chances, but four or five give him only one. New Jersey Senators are the most fortunate, with three. A Kentucky Senator may speak but one hour in the aggregate on any one question. In discussing resolutions Minnesota Senators are restricted to five minutes each. An Illinois Senator must not speak more than fifteen minutes at a time without leave of the Senate. Colorado is more fond of oratory; the limit on a Senator is two hours. Indiana and Missouri give another chance to the mover, proposer, or introducer.

Long speeches have always been a nuisance to auditors, save in the case of a few exceptional orations coming from the lips of

[1] *Records of the Colony of the Mass. Bay in N.E.*, III, 4.
[2] Hening's *Statutes at Large*, II, 207.

the most gifted of men. Length, however, is a matter of comparison, and speeches are long only in contrast with those common at any given time. Apparently our Puritan forefathers, with remarkable powers of endurance and with sundry tastes we now think singular, looked on a two-hour sermon as normal, and began to be bored when it approached three hours. Now we take out our watches if the preacher gets beyond thirty minutes, and we go home quite satisfied if he has not talked more than twenty. We have gone back to the standards of the Council of Trent, which in 1562 adopted the rule that the fathers in delivering their opinions should be restricted to half an hour, which having elapsed, the master of ceremonies was to give them a sign to leave off. Yet, on the same day, an exception was made in favor of Salmeron, the Pope's first divine, who occupied the whole sitting.[1]

Midway the interval since then, whether as a result of the example of the Puritan pastors or by reason of the revival of oratory as an art or for some hidden cause, eloquence expanded into hours. As early as 1738, Horace Walpole spoke for two hours and a half on the Spanish question. This must, however, have been then somewhat exceptional, for when Lord Chatham spoke on one occasion for more than two hours, it was regarded as quite a notable performance. Soon that sort of thing became the rule rather than the exception. Pitt, Burke, Fox, Sheridan, Windham, and other of the orators of Parliament thought nothing of holding the floor for hours at a time. The memorable speeches on the occasion of the trial of Warren Hastings were of extraordinary length. In the course of the violent attacks on Lord North at the close of the American War, it was by no means unusual for two or three speakers to occupy a whole evening in denunciation.[2] On this side of the water, too, long speeches were at that epoch the fashion. In the Congress of the Confederation they are said to have been the rule. Some of the delegates were noted for their ability to talk for hours.

If we may judge by what Senator William Plumer of New Hampshire wrote, March 12, 1806, the Senate of the United States was at first too small for acceptable orations. They were attempted, however, for Plumer said: "I have for some time been convinced that long speeches in the Senate have, in most

[1] T. Phillips, *History of the Life of Reginald Pole*, 397.
[2] B. C. Skottowe, *Short History of Parliament*, 192.

cases, very little influence on the vote. Our number is small; thirty-four when the Senate is full. The documents are printed and laid upon our tables; and those of us who examine for ourselves, and do not vote on the faith of others, form from them our own opinions. Conversation follows, and a free exchange of sentiments. This either confirms or changes our previous opinions; and fixes the votes of others, who never give themselves the trouble of examination. Some are implicitly led by the administration; others have their file leaders. When a Senator is making a set speech, there is seldom a quorum within the bar; the chairs are deserted; and the question is, in the meantime, settled in conversation at the fireside. This conversation is often so loud as to interrupt the speaker. Under these circumstances, it is difficult for any man to make an eloquent and effective speech, when he knows he is not even listened to. Add to this that we have no stenographers, and seldom any hearers in the galleries."[1]

A generation later the conditions had so changed that the Golden Age of senatorial oratory could begin. The Senate had become sizable and the volume of business had not yet become a burden. Some strangers thought the speeches in Congress long and prosy, but Harriet Martineau, in 1835, did not find them so, nor did she think they caused either much annoyance or delay. She did not remember hearing any Senator (always excepting Colonel Benton) speak for more than an hour.[2]

The exception she made of Colonel Benton is illuminating when one comes to read in the "Thirty Years' View" the strictures of Benton on the Hour Rule. In the light of Miss Martineau's parenthesis his indignation over it becomes intelligible. This rule was an innovation in parliamentary procedure. The old rule of Parliament had been that "if any one speak too long and speak with the matter, he may not be cut off; but if he be long and out of the matter, then may the Speaker gently admonish him of the shortness of the time or the business of the House, and pray him to make as short as may be." It has not come to my notice that gentle admonition under such circumstances was practiced in Congress before the coming of the Hour Rule. The nearest approach to it may have been the ruling by Henry Clay, in the early part of 1812, when Randolph had been

[1] William Plumer, Jr., *Life of William Plumer*, 341.
[2] *Retrospect of Western Travel*, I, 182.

interrupted in one of his rambling orations by a point of order made by Calhoun, to the effect that no member should be permitted to address the House unless some proposition, bill, resolution, amendment, or motion was pending. The Speaker *pro tem.* overruled the point, but when Clay returned to the Chair, Calhoun made the point again and Clay sustained him. Singularly enough the just criticism on Calhoun as presiding officer of the Senate in his capacity as Vice-President nearly fifteen years later, was that he refused to call Randolph to order in the course of his malevolent abuse of President Adams, but in fairness it should be said Calhoun took the ground, however untenable, that it was beyond the power of the Vice-President to interfere.

As early as 1822 John Cocke of Tennessee proposed the hour limit for debate in the House, but it was not looked on with favor until the lack of any restriction caused great danger to bills in the Committee of the Whole. By the time of Harrison and Tyler, the passion for long speeches had gone beyond bounds. Charles Dickens, who in 1841 visited both Houses nearly every day during his stay in Washington, wrote: "The inquiry out of doors is not, 'What did he say?' but, 'How long did he speak?'"[1] Bitter partisanship led to a remedy for the intolerable situation. John Tyler's defection infuriated the Whigs, who saw the fruits if their glorious victory stolen from them by the strange fate that sent Harrison to his grave and put in his place the renegade Virginian. Henry Clay, in the Senate, led the Whig forces. Over on the House the "Tylerites" would talk his measures to death. To save the day, it is said, Clay persuaded his Whig allies in the House to put on the gag. In July, 1841, on motion of Lott Warren of Georgia, the Hour Rule was adopted. This was a temporary expedient, but in June of the next year it was made one of the standing rules of the House that no member should occupy "more than one hour in debate on any question, either in the House or in the Committee of the Whole." Since then no man has been permitted to speak more than an hour at a time in the House save by unanimous consent.

Nobody has waxed more indignant over this rule than Colonel Benton. At the time he was in the Senate and beyond its reach. Two years after his thirty years of service in the upper branch, he was elected to the House, where he served one term, and after that he published the second volume of his book, in

[1] *American Notes* (ed. of 1910), 144.

which he took occasion to describe the Hour Rule as "the largest limitation upon the freedom of debate which any deliberative body ever imposed upon itself." He deemed it "an eminent instance of permanent injury done to free institutions in order to get rid of a temporary annoyance." He recalled that the Roman Republic had existed four hundred and fifty years, and was verging toward its fall under the first triumvirate (Cæsar, Pompey, and Crassus) when pleadings before the *Judices Selecti* were limited to two hours; and that the limitation drew from Cicero an affecting deprecation of its effect upon the cause of freedom, as well as upon the field of eloquence.[1] Nevertheless freedom has thus far survived the limit on orations in the American House of Representatives.

Henry L. Dawes said that in its early days the Hour Rule was an iron rule, and the hammer was as sure as fate to come down on a speaker even in the middle of a sentence. When he wrote (1894), the rule was so frequently and so easily evaded that it was practically a dead letter. "Speeches are now prepared without reference to it, and are spread over as much space in circumlocution, tabulation of figures, and quotations, as time and assistants can command. No man can be eloquent even for an hour, much less for four or five, with 'leave to print' at the end. If a speaker knows beforehand that all he can say must be said within his hour, and that nothing can be added beyond that limit, he will study brevity which is the soul of wit, clearness of statement which is the power of argument, simplicity of language which is the key of speech that is effective, and then he will stop." [2]

In the quarter century since Mr. Dawes wrote, the situation has again radically changed. Speeches an hour long are now rare. The important matters are chiefly handled under special rules brought in by the Committee on Rules, which specify the total time for general debate; or else the total is determined upon by an agreement between the Chairman and the ranking minority member of the committee concerned, the House always giving unanimous consent. In either case the time is divided equally between the two sides, and put in control respectively of the Chairman and the ranking minority member. These two men dole out the time — maybe five, ten, fifteen, or twenty minutes

[1] *Thirty Years' View*, II, 247, 248.
[2] "Has Oratory Declined?" *Forum*, October, 1894.

to an applicant, sometimes half an hour, rarely more. Usually the applications for time are so numerous that a fair distribution compels small allotments. Thus without design brevity has been made the rule, prolixity the exception. From some points of view this has been a decided gain. Yet there is occasion to regret the rarity of well-rounded, thorough, exhaustive argument. The oration had its merits.

In the Senate old ways persist. Senator Hale had the clerks in the library make a list of the speeches delivered in that body from April 4, 1917, to April 8, 1918, and found there had been 188 consuming an hour or more of time, 75 of them consuming at least an hour and a half. In the great debates of 1919 and 1920 on the Treaty of Versailles the Senators showed no waning in their powers of articulation.

Mr. Dawes figured that the congressional oratory of the session of 1839–40 covered 1405 pages of the "Congressional Globe"; that of the session of 1889–90 covered 11,568 similar pages of the "Congressional Record." It does not appear how much of this may have been due to "leave to print," but it could hardly have been enough to permit of doubt that the increase in the volume of spoken words had been prodigious. This was partly due to increase in membership, chiefly to increase in business. By 1909 things had come to such a pass that Speaker Cannon calculated that allowing each member to have one minute on each bill introduced would consume almost 260,000 hours, or nearly 26,000 days of ten hours each, which would make the life of the Congress ninety years, instead of two years, as provided by the Constitution.[1] Such figures leave no room for question that debate must be closely limited as long as the present method of trying to handle business prevails. Presently, perhaps, the inevitable will be accepted and administrative detail will be taken out of Congress. When that body rids itself of the enormous mass of triviality that clogs its wheels, there may again be opportunity to debate thoroughly the important questions of policy.

Contrast our habit with that, for example, of France. There the Chamber, which spends a great deal of time over the Budget and over such matters as interpellations, debates thoroughly only two or three bills a session. In 1913 about two hundred and fifty bills were passed without debate, twelve with debate, and in the case of only three of these twelve was there any discussion of

[1] *Century Magazine*, June, 1909.

the articles and amendments. France entrusts the making of rules and regulations — that is, administrative law — to specialists, its administrators. Evidently on minor matters of policy it imposes great confidence in the judgment of its committees, who doubtless are watched closely by the Ministry. Americans will be long in accepting such a system, if indeed they ever go to the French extreme, but it is not rash to predict that the pressure of work will drive us toward getting rid of debate on details.

The desirability of this might at first glance seem inconsistent with the fact that at least in the National House the most effective debate takes place under a five-minute rule in the Committee of the Whole. Yet the two things can be reconciled by saying that if we must have debate on detail, it can hardly be better handled than on the House system. The speeches, necessarily compact, are directed to a definite point, and the interest bred by sharp controversy induces members to keep quiet and listen. However, no adequate treatment of any important theme is possible in five minutes or in five times five minutes. To be sure, there is the story of the revivalist who said on the strength of long experience, "No soul saved after the first ten minutes." It may be suspected the anecdote is apocryphal. An effective point may be scored in ten minutes or even five minutes, but to treat with such celerity any matter of intricacy is out of the question. It is possible a succession of short speeches may happen to cover all the essential phases of a question, but that is so largely a matter of chance as to leave the single, well-rounded, comprehensive argument still the better way to persuade.

One of the State Constitutions, that of Texas, says no bill is to become a law until free discussion has been allowed thereon. So far as I have observed, no other State is confronted by any constitutional obstacle in the way of limiting debate. Several of the Legislatures have found it expedient to put limits into their rules. The most drastic restriction I have noted is that of the Missouri House, where no member, except when reporting a bill or resolution from a committee, may speak more than five minutes, unless by unanimous consent. The most generous to come to my notice is the hour rule in Georgia. Between these extremes are at least nine other States. Alabama and Washington have a ten-minute rule; Mississippi also, but with a limit of five minutes on amendments; Texas also, except that the mover or the committee member in charge may speak twenty minutes in opening and again in

closing, extension of time for more than ten minutes to be only by unanimous consent. North Carolina permits thirty minutes in opening, fifteen for rejoinder; Tennessee makes the like figures fifteen and ten. Louisiana lets a member speak twice, half an hour at a time; North Dakota twice, twenty minutes the first time and ten the second. In the New York Assembly no member is to speak for more than fifteen minutes at a time, except by consent of two thirds of the members present.

Such narrow limitations are of doubtful expediency, and the fact that most of the Legislatures get along without them indicates that they are not a necessity. Even a body with as much business as the Canadian Parliament can transact it without time limits. At the various readings a man may speak only once on the same question, Sir J. G. Bourinot says, but there is no limit to the length of his speech except what good taste and the patience of the House impose upon him. "In Committee there is no limit to the number of speeches on any part of the bill, but, as a matter of fact, the remarks are generally short and practical, unless there should be a bill under consideration to which there is a violent party antagonism, and a disposition is shown to speak against time and weary the Government into making concessions, or even withdrawing the objectionable features of the measure." [1]

Evidently in Canada, as in the Legislatures of our eastern States and some of the others, the annoyance of unduly long speeches is kept within bounds by unwritten standards of propriety that most men instinctively observe.

In the British House of Commons, on the contrary, conditions much like those in Congress are imposing like necessities. Not long ago it was found that of the ninety-five Standing Orders regulating the public business of the House, no less than thirty-four dealt in some form or other with the restriction of debate. The draft report recommended by the Chairmen and supported by three members of the Select Committee on Procedure in 1914 would have put on speeches time limits running from ten to thirty minutes, according to specified conditions. Mr. Asquith told that committee he thought a full-dress debate on the first reading of a bill to be really waste of parliamentary time, and though he would not apply to it rigidly a ten-minute rule, he would confine it to a couple of speeches. Mr. Whitley pointed

[1] *Canadian Studies in Comparative Politics*, 59.

out that the tendency to discuss private bills and provisional order confirmation bills had greatly increased in recent years. Mr. Balfour said that whereas in what are called the great days of parliamentary institutions most of the members were content to be silent, and to act as jurymen while the great cases were pleaded before them by distinguished counsel on either side, your Pitts and your Foxes, your Peels and your Althorps or Russells, now the whole thing is changed. This he explained by saying that all the members of Parliament now have a degree of practice in public speaking which was given to very few a hundred years ago; all of them have constituencies who closely watch their action, and who are divided between the anxiety of getting their member down to a smoking concert and the anxiety of seeing him make a speech or ask a question in the House of Commons. He saw no way of getting over the difficulty unless, as under Lord Robert Cecil's proposal of Grand Committees, a method should be found by which many of the members could speak at once.

Quite apart from the question of limiting the length of speeches is that of limiting the total of debate. Here the judgment of a good presiding officer or floor leader, with a sense of proportion, is invaluable. Standing orders or special rules cannot fully meet the need. Curiously enough, they sometimes increase that need. In the National House now and then it may be observed that the Hour Rule and the agreements for a specified duration of debate actually tend to needless prolongation of talk. If the bargain is that each side shall have not more than an hour, then each side tries to fill every minute of the hour, or makes but faint attempt to conclude in less than an hour. Those in charge seem often to view the minutes as gifts to dispense in the fullest measure possible. Rarely will any speaker sit down before the hammer falls. The result is that matters which ought to be and might be disposed of in a few minutes, get hours. For example, on the 12th of May, 1920, with the end of the session hoped to be less than a month away, there were on the House Calendar 258 favorable committee reports awaiting action. In the course of the sitting on that day the House succeeded in taking up three bills, all unanimously favored by the Committee on Interstate and Foreign Commerce, known to be a cautious, trustworthy committee. No serious opposition to any one of them showed itself on the floor. A few objectionable amendments were presented. The

three bills ought easily to have been disposed of in an hour or two. Yet the House was unable even to conclude the third. Had there been no time limits or arrangements, and had the motion for the previous question been ruthlessly applied, two or three times as much ground could have been covered that afternoon.

The Alabama Senate has an admirable rule that limits debate on an adverse committee report to sixty minutes. An altogether needless waste of time is caused by lengthy discussion of adverse reports. Experience shows that only rarely does a bill reported adversely run the gantlet of both Houses and the Governor. The chances of success are too small to warrant giving such a bill in the first instance more than time enough to persuade the House, if possible, that in spite of the position of the committee, the proposal ought at least to be considered.

Criticism of Congress or any other legislative body that is based on mere volume of speeches is quite beside the mark. "It is said by eminent censors of the press that this debate will yield about thirty hours of talk, and will end in no result," Mr. Bright is quoted as having remarked on one occasion in the House of Commons. "I have observed that all great questions in this country require thirty hours of talk many times repeated before they are settled. There is much shower and much sunshine between the sowing and the reaping of the harvest, but the harvest is generally reaped after all."

CHAPTER XII

CLOSURE

DEBATE can be stopped by decision to take a vote: (1) never; or (2) on another day if at all; or (3) speedily; or (4) forthwith.

It is believed that in the development of parliamentary law the first device to avoid ever passing judgment on a proposal was introduced in 1604, taking the form, "Shall the main question be put?" Instead of "main" the adjective "previous" has come into use, but without changing the intent, for either word contemplates a decision as to what shall be done about the principal subject under consideration.

In the Short or Long Parliament the insertion of a little word, of but three letters, totally changed the nature of the motion. That word was "now" — "Shall the main question be now put?" It is said that Sir Harry Vane was responsible for this, that he invented it in order to silence the friends of the Crown, and that Sir Robert Howard declared "it was like the image of its author, a perpetual disturbance."

Whoever devised it, that word "now" made trouble not only for the Royalists of the time, but for parliamentary bodies long afterward. What were its implications? Did an answer in the negative mean that the House merely refused to take an instant vote, or refused to take a vote that day, or refused to take a vote until debate was exhausted, or refused ever to take a vote? Did an answer in the affirmative cut off debate? Could the main question be discussed while the motion for putting it "now" was pending? Could further amendments be offered while that motion was pending, or after it had been decided in the affirmative?

By the time Jefferson came to compile his "Manual," Parliament had ceased to hold that a decision in the negative meant the vote on the main question should not be taken until debate was exhausted, and had decided it meant the main question was suppressed for the day, which usually was interpreted as a defeat, with the anomalous corollary that when a motion for the previous question was decided in the negative, it was said to be carried. This awkwardness was emphasized by the form used in the Congress of the Confederation, and perhaps then used

in Parliament — "Shall the main question be not now put?" Elias Boudinot when President of Congress recommended the omission of "not." This, however, did not settle the question of whether when the previous question had been moved, debate could continue on the main question. Such debate gives the opponents of the main question the decided advantage of two strings to their bow, inasmuch as they get full scope, not only to attack the proposal as to its merits, but also to protest against immediate decision. Furthermore, the motion fails to bring talk to an end.

Parliament did not find this objectionable, but in Congress it made so much trouble that in 1805 the privilege of debating the motion was annulled. Two years later, though, when Speaker Varnum tried to prevent debate after the previous question had been ordered, the House followed the lead of John Randolph, and after long argument, refused by 103 to 14 to sustain the Speaker. In February of 1811 it again reversed its position. Barent Gardenier of New York, renowned for his capacity to make long speeches, being able to keep the floor for days, taxed the patience of the House beyond endurance when the majority was trying to pass the bill to interdict commercial intercourse between this country, Great Britain, and France, and their dependencies. After many hours of struggle between the supporters and opposers of the coming war, about three o'clock in the morning the Speaker, trying to enforce the latest position of the House, was again overruled, this time by 66 nays to 13 yeas on the question of sustaining.

Henry A. Wise, in his "Seven Decades of the Union" (p. 53), describes what happened in the following year when the Federalists filibustered: "An elderly gentleman from New England with rather goggle-eyes, took the text of peace, and spun it out exceedingly fine and broadly disquisitive, like Captain Dalgetty's pious tormentor, far beyond 'eighteenthly,' and never towards 'lastly,' until Bellona, or some one else, resorted to most startling means of storming the tenure of the floor to get the 'previous question.' The Speaker of the House, and most of the members, making a bare quorum, were asleep, and there was nothing to disturb the solemn silence but the Dominie-like drawling of the member on the floor, — didactic, monotonous, and slow; the Clerk's head bent low down upon the Journal; when, lo! sudden noises, rattling, dashing, bounding down the aisles,

awoke and astonished Speaker's chair and Clerk's desk; spittoons were bounding and leaping in the air, and, falling, reverberating their sounds like thunders among the crags of the Alps. 'Order! Order! Order!' was the vociferated cry; but, in the midst of the slapbanging confusion of the no longer drowsy night the hum-drum debater who had the floor took his seat from fright, and a belligerent Democrat snatched the pause to move the 'previous question,' which was seconded, and the declaration of war against Great Britain was thus got at, and carried in the House of Representatives of the Congress of the United States in June, 1812."

New England was bitterly opposed to the war, and the suppression of its spokesman by the use of the previous question was doubtless in the mind of Daniel Webster when, in the Massachusetts Convention of 1820, he adverted upon the rule for the previous question that had been adopted. "If," he said, "there was anything curtailing a just freedom of debate, it was this. As it had sometimes been used, it was certainly an instrument of injustice." For his own part, he presumed it would never be exercised in this body — or not except in extreme cases; otherwise he should himself have hoped to see it stricken out.

In Congress it had already fallen into disuse. In nearly twenty years it was ordered only four times. In 1816 Richard Stanford of North Carolina made an unsuccessful attempt to abolish it, being vigorously seconded by John Randolph, who called it a gag law, and William Gaston, who made an elaborate historical argument; but Henry Clay defended it, saying it had not been resorted to until abuse of debate rendered it expedient, and reminding the House of the man who for purposes of delay had spoken four and twenty hours without stopping. With the revival of its use after the new birth of partisanship under Jackson, it developed dangers leading to various attempts to safeguard and perfect it, but not until the rules revision of 1860 was a satisfactory status reached. Then the principle was finally established that a negative decision left the main question the same as if the previous question had not been demanded.

At the same time a position was reached on the vexed problem of amendments. Jefferson in his "Manual" (sec. XXXIV) had considered whether a main question might be amended after the previous question on it had been moved and seconded. Hatsell doubted whether this might be done if the Chair had proposed

the question, but thought it could if the question had not been proposed. Jefferson thought that since the House is in possession of the question as soon as it is moved and seconded, Hatsell's discrimination was not sound. He pointed out that the object of the previous question being to get rid of discussion that may not be expedient, this object might be defeated by the introduction of an amendment which might bring on just the discussion it was sought to avoid. On the whole, he thought it best to decide which course would lead to the less inconvenience — whether to put it in the power of one side of the House to defeat a motion by hastily moving the previous question, or to put it in the power of the other side to force on, incidentally at least, a discussion that would better be avoided. The latter he thought the less inconvenient, "inasmuch as the Speaker, by confining the discussion rigorously to the amendment only, may prevent their going into the main question, and inasmuch also as so great a proportion of the cases in which the previous question is called for, are fair and proper subjects for public discussion, and ought not to be obstructed by a formality introduced for questions of a peculiar character."

In 1840 John Quincy Adams prevailed on the House to adopt a rule requiring that a vote for the previous question should "bring the House to a direct vote upon amendments reported by a committee, if any, upon pending amendments, and then upon the main question." This precluded the offering of further amendments. Worse yet, it was possible, after long debate on one or two amendments, to precipitate a vote without any discussion at all on others. The danger led to including in the rules of 1860 provision that the previous question might be moved on a pending amendment, or an amendment thereto. The former practice still prevails in the Massachusetts House and to my mind is one of the few blemishes on its admirable rules. Together with other defects in the handling of amendments, it ought to be remedied. Georgia permits the previous question on a single motion or an amendment, "or it may be made to embrace all authorized motions, or amendments, and include the entire bill to its passage or rejection." Arizona says likewise. In the Iowa House the mover is to state specifically in his motion whether it shall apply to the main question and the amendments, or to the amendment or amendments only. The weight of rulings or authority in the Connecticut House is to the effect

that the previous question when ordered applies only to the immediate question before the House, and does not cut off debate upon any questions at issue that properly precede the definite question under debate.

Requirements for seconding the motion for the previous question furnish a striking illustration of the tenacity with which barnacles cling to the ship of state. There never was any need of such requirements. It took Congress nearly a hundred years to find this out. That body began by saying five members should demand the previous question: in 1811, changed to one fifth of the members present; in 1812, made it a majority; and in 1880 dropped the whole thing. Many of the States still persist in the quite superfluous machinery. You may find it encumbering the rules in Maine, New Hampshire, Pennsylvania, Ohio, Minnesota, Wisconsin, Kansas, Texas, and at least half a dozen other States. In Tennessee the previous question "shall only be admitted when demanded by two thirds of the members present." Also in Virginia a two-thirds vote is required for ordering the main question, but a majority may require an immediate vote on the pending question, whatever it may be.

In Congress and in some, if not most, of the Legislatures, it is permissible for even the opening speaker to move the previous question before taking his seat. The abuse of this power denies fair play to the opposition and is contrary to the spirit of parliamentary institutions. The Georgia Senate meets the danger by prescribing that no Senator, before yielding the floor, shall make any motion that if prevailing would prevent further debate; with the further requirement that a motion to adjourn or lay on the table shall be in order before the question on closing debate is taken. Such a precaution against summary action ought to commend itself, for instance, to the Illinois Senate, where it is said to be not unusual to move that a bill be taken up on third reading and final passage out of its order, and immediately to move the previous question. This objectionable procedure prevents any debate whatever upon the measure, since the earlier stages were passed perfunctorily, all discussion having been postponed until third reading.[1]

The rule of the Massachusetts House allows ten minutes of debate on a motion for the previous question, not more than three minutes to any one member, and it specifically says, "de-

[1] H. W. Dodds, *Procedure in State Legislatures*, 73.

bate shall be allowed only to give reasons why the main question should not be put." This is one of the impracticable rules that delude the stranger. It is almost impossible to say why a question should or should not be put, without touching on the main question, and a Speaker who tried to draw a sharp line would risk losing the good-will of the House. He has unusual reason for avoiding displeasure in the matter, because he is very often the instigator of the motion, in performance of his duty to hasten business. When he thinks a bill or motion has been debated long enough, sometimes after consultation with the members most interested in the particular matter, sometimes on his own responsibility, he sends word or gives the preconcerted signal to a trusted friend, who is promptly recognized on rising to move "the P.Q." For this ungracious task it is usual to choose some elderly member who rarely if ever takes the floor for any other purpose, and is not unwilling to go down to history as "P.Q." Jones or Smith, or whatever it may be. Very likely it was such a man who in the National House roused the ire of John Randolph by breaking his long pauses with motions for the previous question. "Mr. Speaker," Randolph snapped, "in the Netherlands a man of small capacity, with bits of wood and leather, will in a few moments construct a toy that, with the pressure of the finger and the thumb, will cry, 'Cuckoo! Cuckoo!' With less of ingenuity and inferior materials the people of Ohio have made a toy that will, without much pressure, cry, 'Previous question, Mr. Speaker! Previous question, Mr. Speaker!'"[1]

The original purpose of the previous question, that of preventing or stopping debate, is accomplished in Congress by the perversion of a legitimate and useful procedure, known as laying on the table. The proper intent of this procedure is to put a measure where it can be taken up at some more convenient or suitable time. Congress has needlessly changed this into a procedure that in effect prevents ever taking the matter up again — that is, kills it. The change was not made deliberately. The proper use of the motion continued at least as late as 1809. At some time in the next thirty years or so, it dawned on somebody that under the rules it was easy to put a matter on the table, hard to get it off. This was because the motion to table is privileged, — that is, can, with some restrictions, be put at any time, — but a motion to take from the table can be blocked by a single

[1] Henry Adams, *John Randolph*, 294.

objection on the score of the regular order. Furthermore, the motion to lay on the table must be decided without debate. On this foundation was built what has become an established practice, the use of the motion for purposes of killing. Questions of high privilege, such as those relating to seats of members and vetoed bills, may be taken off the table, but the occasion is rare.

This congressional anomaly has found few imitators. In early days Iowa copied it, but abuses developed, and gradually the motion for indefinite postponement came to be preferred until now it spells the fate of more than a quarter of the bills. Perhaps other States have tried the tabling expedient, but Mr. Reed thought Congress alone in its use. Looking in the same direction, however, though not going the whole distance, are rules in Missouri, Tennessee, Arkansas, and perhaps a few other States requiring a two-thirds vote to take a matter from the table.

In the National House a vote to table an amendment carries with it all other amendments and the main question as well. The Senate, however, has a rule under which an amendment can be tabled by itself. The California Senate has copied this, and in my judgment all other assemblies ought to copy it if motions to table amendments are to be entertained, provided that at least some debate of them is permitted. Whatever helps independent and adequate treatment of amendments is to be encouraged. Georgia perhaps does better in forbidding a motion to lay an amendment or substitute on the table; the rule is to the effect that nothing can be legitimately laid on the table excepting that which can be taken up again.

The motion for indefinite postponement is not much used in legislative bodies. In the National House it has been held debatable, so that it cannot be resorted to for avoiding or stopping talk. It is never made in the Massachusetts General Court. Postponement to a time certain is rarely used in America for getting rid of matters, but is distorted to murderous ends in Parliament just as the motion to lay on the table has been distorted in Congress. Of late years in the House of Commons it has been customary to move that the bill be read this day six months, or three months, the date being such as to fall beyond the end of the session. On the general principle that a question which the House has decided cannot be raised again, such a vote kills the bill. Nor does it make any difference that the House happens to

be sitting at the end of six months, for that date is treated as a sort of Greek calends that never comes.[1]

One accustomed to the direct and simple methods of the Massachusetts House finds it hard to understand why any of these expedients for killing by indirection are thought of any value. It is there found easy to get a straight-out "Yes" or "No." Evasion is nowadays undesirable. No questions now arise that cannot be squarely confronted. No princes are to be feared. No scruples have to be respected. Why anywhere beat the Devil round the stump?

Obstruction History

Decision to take a vote speedily or forthwith involves (*a*) stopping or curtailing speeches, and (*b*) suppressing other dilatory action.

The stopping or curtailing of speeches may be desired simply to save the time of the House, in the belief that everything essential has been said or that more important matters ought to be reached. The first parliamentary action with this in view may have been the rule agreed upon by the House of Commons April 17, 1604, that "if any superfluous motion, or 'tedious' speech be offered in the House, the party is to be directed and ordered by Mr. Speaker." This was followed in the first body of rules of the Pennsylvania Assembly, adopted in 1682, but was modified into "Superfluous and tedious Speeches may be stopt by the Speaker." Evidently this did not meet the case, for in 1703 it was provided "That if it shall at any time happen, that a debate prove tedious, and any four Members shall stand up, and request the Speaker to put the Matter in Debate to the Vote, he shall not refuse it."

It is probable that such rules were not aimed merely at the bores who droned away the hours, but that by this time the inconvenience of speeches prolonged purely for delay had been felt. Obstruction by long speeches would even then have been nothing new. It goes back at least as far as the Roman Senate. If the prolix orators could waste the time until the setting of the sun, they could stave off action. If they were refused what we should call an extension of time, they could pose as martyrs and win popular sympathy. Suetonius tells us that when Julius Cæsar was prætor, he was the only member of the Senate who

[1] A. L. Lowell, *The Government of England*, I, 274.

would not vote to inflict capital punishment on the accomplices of Catiline. He persisted in obstructing the measure until a body of the Roman knights, who stood under arms as a guard, threatened him with instant death if he continued his determined opposition. They even thrust at him with their drawn swords, so that those who sat next him moved away, and a few friends with no small difficulty protected him by throwing their arms around him and covering him with their togas.

Cato the Younger in his stout fight against Cæsar and Pompey resorted to obstruction with a craftiness not surpassed by present-day zealots. Once when an hour had been assigned to his chief supporter, it was wasted in lamentation over the shortness of the time. Then Cato used up the two hours assigned to himself by talking on minor and irrelevant matters, reaching the real issue at just the right time to give the impression that he was being cut off when he was about to say something of real importance that the dominant faction wanted to suppress. To heighten the effect, he persisted in speaking after the presiding tribune had ordered him to stop, whereupon he was dragged from the rostra and ejected from the Forum. Not yet silenced, however, he returned several times, shouting his complaints. It all might have happened much the same yesterday in some American Legislature, with this morning's papers mourning over the shameful decadence of statesmen, denouncing obstruction, demanding that the rules be changed so as to permit business to be done.

In the last few years of the Roman Republic there were recorded a dozen instances of obstruction by talking against time. It is said that the irrepressible Cato carried the practice to triumph in the end. The story is that he was filibustering against an agrarian measure which the presiding consul, Cæsar, was very anxious to pass. Cæsar ordered the officer we would now call the sergeant-at-arms, to remove him. Cato was removed, but the whole Senate followed him, and no magistrate ever again tried to stop debate.

In the House of Commons a frequent source of obstructive speeches was the motion to bring in candles so that business could be continued after daylight failed. There was not much profusion of language for the mere sake of delay until party feeling ran high in the latter part of the eighteenth century. Then for the purposes of obstruction came not only the tireless orator,

but also the dilatory motion. Edmund Burke called for twenty-three divisions at a single sitting and gloried in it afterward. Another century was to pass before the use of such devices grew to be really serious and compelled reform of procedure. This came about through the course of members from Ireland, who resorted to dilatory tactics, not merely for the sake of defeating certain bills, but also to rivet public attention on their demand for Home Rule. Parnell, skillful and fearless, led the battle. Its climax was capped in 1881. In that year the House sat on 154 days and for 1400 hours; about 240 of these hours were after midnight. On the Irish Coercion Bill the House sat continuously once for twenty-two and once for forty-one hours. The debates on the Coercion Bill took up forty-two sittings, and on the Land Bill fifty-eight. Of the 14,836 speeches delivered, 6315 were made by Irish members. The Speaker and the Chairman of Committees interposed on points of order nearly 2000 times. Parnell with his minority of twenty-four dominated the House.[1]

On the occasion when the House had sat for forty-one hours, with all business obstructed by the Home Rule group, Speaker Brand at last took the matter into his own hands, refused to entertain any more motions, refused even the right of debate, and proceeded to put the main question on his own authority. He said:

"The dignity, the credit, and the authority of this House are seriously threatened, and it is necessary that they should be vindicated. Under the operation of the accustomed rules and methods of procedure, the legislative powers of the House are paralyzed. A new and exceptional course is imperatively demanded, and I am satisfied that I shall best carry out the will of the House, and may rely on its support, if I decline to call upon any more members to speak, and proceed at once to put the question from the chair. I feel assured that the House will be prepared to exercise all its powers in giving effect to these proceedings. Future measures for censuring disorderly debate, I must leave to the judgment of the House; but I may add that it will be necessary either for the House itself to assume more effectual control over its debates, or to entrust greater authority to the Chair."

The next day the House adopted an "urgency" rule, under which, if the Speaker told the House that in his opinion it was the general sense of the House the question should be put, and

[1] John Morley, *Life of W. E. Gladstone*, III, 57.

if he was sustained in this view by a vote of more than three to one, he should put the question forthwith. This was changed in the following year by reducing the support required to two hundred members (or one hundred when less than forty voted in the negative). It was also provided that if the Speaker should consider a motion for adjournment, either of debate or of the House, an abuse of the rules, he was thereupon to put the question.

This procedure, known as the "closure," was strenuously opposed by the party then in opposition. However, it neither justified the fears of its critics nor met the hopes of its friends. In five years it was used but twice. On the occasion of its first use, in 1885, the Speaker was supported by only 207 members — a margin of but seven votes. So small a margin was not likely to encourage any Speaker to run the risk of a rebuff except in the most serious situation. The initiative had to come from him, and this was clearly an unwise restriction. In 1887 the party that had fought closure five years before, now in power and unable to push matters through without some more effective way of getting decisive votes, found itself compelled to accept the inevitable, precisely as happened in Congress a few years later in the matter of the Reed quorum-counting rule. So the closure was strengthened by putting it within the power of any member to move "that the question be now put." The share of the Speaker in the matter was changed so as to give him the power to refuse to put the motion if he thought it an abuse of the rules of the House, or an infringement of the rights of the minority. It is now required that at least a hundred members shall vote in the majority. Speaker or Chairman may refuse to put dilatory motions, such as those for adjournment, reporting progress, or leaving the chair. If he thinks that members frivolously or vexatiously claim a division, he may call upon those who support and those who challenge his view to rise, and accordingly as he sees fit may either declare the determination of the House or Committee, or may appoint tellers for a division. The Speaker's power has proved no fiction. In a third of the cases he has refused his assent. At first he even refused motions of the Government, but now that seldom or never happens.

As far as it went, the closure accomplished its purpose, speeding up business to great advantage, but it did not go far enough in its original form. No limit being put on the length of speeches, and members still having the right to speak in Committee as

often as they pleased, much waste of time continued, with corresponding delay in reaching decisions. Furthermore, since the procedure brought only a single question to an issue, it was insufficient for complicated measures. So in June, 1887, was devised what has come to be known as "the guillotine." Twelve days had been used on the first and second readings of the Irish Crimes Act, and fifteen more in Committee of the Whole had been spent on but four out of twenty clauses of the bill. In desperation the Government moved that at the end of the following week a vote should be taken on every question necessary to bring the committee stage to an end. This process, thoroughly familiar to American assemblies, seemed revolutionary to Englishmen but it had become unavoidable. It did not suffice, for it resulted in needlessly long discussion on a few early clauses of bills, leaving the later clauses without fair treatment. So in 1893, after twenty-eight nights in Committee on the first four clauses of the Home Rule bill, five dates were set for votes on groups of clauses, thus bringing to pass what is sometimes called "closure by compartments."

A more recent device, commonly known as "the kangaroo," gives to Speaker or Chairman the power to select amendments to be considered. At first the power was conferred upon motion in specific cases. The Select Committee on House of Commons Procedure in 1914 advised that it be made a general power, a permanent instead of an occasional attribute of the Chair, and when the end of the war gave time to attend to these matters, this was made one of the reforms of February, 1919. Mr. Asquith told the Committee of 1914 that he thought this form of closure the most satisfactory in actual working. Speaker Lowther saw the dangers. In his judgment it would be a mistake to give too much power to the Speaker. He had responsibilities enough already, and it is a mistake to make him too powerful a factor in the general discussions of the House. It is very often extremely difficult to tell until you hear an amendment put forward, supported, and argued, what it really involves. The Speaker might overlook some serious point by reason of the amendment's apparently involving only some slight changing of words. A critic in the "Round Table" of September, 1918, pointed out the weaknesses of the expedient, declaring that it adds omniscience to the many qualities already demanded of the Chair, leads to unseemly and unprofitable wrangles between the Chair and dis-

appointed members, and contains untold possibilities in the way of neglected amendments of consequence. In our country the suspicion of presiding officers, that has been exaggerated of late, would probably preclude copying the idea until more trustful days.

In the decade from 1905 to 1914 inclusive, closure was moved 813 times. Then in the war period it disappeared, not being moved once in five years — surely a remarkable proof of patriotism in time of crisis.

None of the Houses of the British Dominions have had occasion to adopt the drastic closure rules of the Imperial Parliament. There are no rules in force for limiting the length of speeches in the Parliament of the Dominion of Canada, or in most of the provincial Legislatures. Ontario, however, provides that no member shall speak to a motion to adjourn the House or the Debate for more than ten minutes; and Nova Scotia restricts speeches to an hour and a half, unless by special leave of the House. No member of the New Zealand House is to speak more than half an hour at a time, with specified exceptions permitting an hour on the more important matters. In Committee of the House no member is to speak more than ten minutes at a time, or more than four times on any one question, the rule not applying to the member in charge of a bill. Speeches on motions to adjourn are limited to five minutes, save that Ministers have ten; the whole debate thereon is limited to two hours. A few restrictions are found in the other States and Dominions, but not many.

France was driven to the "clôture" (as the French spell it) many years before England. M. Guizot, speaking in 1848 before a committee of the House of Commons on "Public Business," said that before its introduction in France in 1814, debates were protracted indefinitely. In the thirty-four years during which it had then prevailed, the majority had never abused the power and no member could imagine that without it the debates would have been properly conducted. The French application of it has limitations incidental to the peculiarities of French parliamentary procedure. There the Ministers not only have the right to take part in the debate in each Chamber, but also they can be assisted by commissaries, appointed by the President of the Republic, for the discussion of a particular bill. Furthermore, permission to speak is always granted to a Senator or Deputy after a member of the Government has spoken. Consequently the clôture

cannot be demanded if a member or a commissary of the Government desires to speak, or until a Deputy, if he insists on his right to address the Chamber after a Minister, has answered him; nor can it be entertained so long as a member is speaking from the tribune. The motion for adjournment of the debate to the next day has priority.

The clôture process is interesting. When the Chamber is becoming tired of the debate, or it is desired to interrupt the member who is speaking, one or more members cry out "La Clôture! La Clôture!" The President immediately puts the question, and if a member of the minority wishes to speak, he is allowed to assign his reasons against closing the debate; but no one can speak in support of the motion, and only one member against it. If it is resolved in the affirmative, then the main question is put to vote. As every amendment constitutes a debate, and the clôture can be demanded on every debate, it follows that the motion may be frequently made in the course of the same sitting.

In Switzerland closure is applied if two thirds demand it, but not so long as a member who has not yet spoken wishes to make and explain a motion. Some form or other of the procedure is to be found in most of the lawmaking bodies of the world, but it has not yet put an end to protracted utterance. Dr. Lecher spoke twelve hours in the Austrian House of Deputies. In 1897 a delegate in the Roumanian Chamber of Deputies used thirty-seven hours in demanding the indictment of Joan Bratiano. The year before that a sitting of the Canadian House of Commons on a bill dealing with the schools in Manitoba lasted 180 hours. In 1893 there was a twenty-six hour speech in the Parliament of British Columbia. In Chile a single speech is reported to have lasted through ten days of a session

Filibustering in Congress

Obstructive tactics early became so familiar in the United States that a distinctive name for them was coined, "filibuster," used either as noun or verb. It comes from the Spanish *filibusteros*, who were West Indian pirates, using a small swift vessel called a *filibote*, originally *fly-boat*, and said to have been named from the river Vly in Holland. The term came to be applied to all military adventurers, and then to legislative minorities who used what the majority deemed piratical, disorderly, lawless methods.

When what we now know as filibustering began in this country, nobody conjectures. Probably instances of it could be found in the history of every colonial assembly. Certainly it appeared in the very first Congress of the United States. In June of 1790 that body was quarreling over where it should thereafter sit. Fisher Ames, writing to his friend Thomas Dwight, speaks of it as "this despicable grog-shop contest, whether the taverns of New York or Philadelphia shall get the custom of Congress," and says it "keeps us in discord, and covers us all with disgrace." (Evidently there was a lobby representing the interests found ever after in the legislative halls of every State where the sale of liquor had not been prohibited.) Ames was unhappy because the advocates of national assumption of the State debts had been "sold by the Pennsylvanians," as he phrased it. They had thrown assumption overboard to get votes for Philadelphia. "We had voted in the House for Philadelphia. The Senate disagreed. The motion being renewed in the House, we have opposed it, first to gain time, and next to baffle the scheme *in toto*. Yesterday it rained, and Governor Johnson, who had been brought in a sick bed to vote in Senate against Philadelphia, could not be safely removed in the rain. It was supposed, that if the resolve to remove could be urged through the House and sent up while it continued raining, that it would pass the Senate. They called for the question, but Gerry and Smith made long speeches and motions, so that the question was not decided till this morning. Rather than gratify the Pennsylvanians, and complete their bargain at the same time, *we* voted for Baltimore, which passed by two majority, to the infinite mortification of the Pennsylvanians."[1]

Another early instance of filibustering may be found in the controversy over the payment of the witnesses summoned at the time of the impeachment of Judge Chase, in 1803. When in the closing hours of the session Randolph tried to get the money out of the contingent fund of the House, the Federalists hurried from the hall, breaking the quorum. No sooner had they been summoned back than they were able to take advantage of the reading of a message from the President and again disappear. Again the Sergeant-at-Arms was sent after them, and a third time did they vanish, while the Speaker was attending to an enrolled bill. Then amid the laughter following the third an-

[1] *Works of Fisher Ames*, I, 79.

nouncement of no quorum, Randolph, baffled and angry, gave up the fight.

Eight years later he himself resorted to the same tactics, in a struggle much more protracted and bitter. It was over the proposal to revive the Non-Intercourse Act of 1809, and began February 26, with adjournment due before midnight of March 3. On the first day the House sat for eighteen hours, witnessing expedients for delay. The story of it would lead one to doubt if anything novel for that purpose has since been devised. Of course there were the interminable speeches, and besides there were the steps now become familiar, the breaking of quorums, the summoning of absentees, all sorts of dilatory motions. The minority wasted the next day, the majority keeping silence. In the evening, after a recess, Randolph opened an all-night session with motions to postpone. His Virginia colleague, John W. Eppes, could stand it no longer and charged Randolph with seeking to delay and defeat the bill. Randolph, unbalanced by liquor, gave Eppes the lie direct, and of course the House was at once in an uproar. Order being restored, Eppes immediately wrote and sent over to Randolph a challenge, which he instantly accepted, then leaving the hall to arrange for the duel. Dreary speechmaking was resumed and had droned on into the small hours when the endless Barent Gardenier got the floor. The appalling prospect led to desperate measures. The floor was taken away from Gardenier long enough to get in a motion for the previous question, the House (as told earlier in this chapter) refused to let it be debated, and at five o'clock in the morning the bill was passed.

Thoughtful men were beginning to discuss the knotty problem of obstruction. Thomas Jefferson, who had a remedy for many things, with more leisure on his hands for philosophizing now that he was out of the White House, had been writing on the subject a year before to that same John W. Eppes who was to quarrel with Randolph. Jefferson submitted that worse than the effect of long speeches on the proceedings of the House was the disgust they excited among the people, and he deplored, much in the fashion of a century later, the disposition these speeches were producing to transfer the popular confidence from the legislature to the executive branch. By the way, the more one reads about the procession of alarms on this score since 1789, the more astonished he becomes at the vast volume of popular confidence in

the national legislature there must have been at the start. Otherwise the reservoir would have been drained dry long, long ago!

Jefferson observed that the House was trying to remedy what he termed the eternal protraction of debate, by sitting up all night or by the use of the previous question. "Both," he thought, "will subject them to the most serious inconveniences. The latter may be turned upon themselves by a trick of their adversaries. I have thought that such a rule as the following would be more effectual and less inconvenient. 'Resolved that at (VIII.) o'clock in the evening (whenever the house shall be in session at that hour) it shall be the duty of the Speaker to declare that hour arrived, whereupon all debate shall cease.' " A vote on the main question should be immediately taken by Yeas and Nays, secondary questions to stand discharged. One vote, however, might be taken on a motion to adjourn. The rule should be suspended during the last three days of the session.[1]

Fourscore of years were to pass before the remedy should be found, and then it was not in the direction Jefferson had pointed out to Eppes, but in another that he had hinted at in his "Manual" long before. There he had said, in section 32, that when a member desires the reading of something, "if it be seen that it is really for information and not for delay," the Speaker directs it to be read without putting a question, if no one objects. To be sure, this was a very slight recognition of power for the Speaker to exercise judgment, but still it was recognition that this might be done. Slowly the idea grew. Somewhat timidly and tentatively the Speakers developed the power. Said Blaine in the 43d Congress: "The Chair has repeatedly ruled that pending a proposition to change the rules dilatory motions could not be entertained." Randall, in 1877, refused to entertain dilatory motions during the count under the Electoral Commission Act: "The Chair desires to say to the House that he does not of course know what the intention of those motions is; he has only to look to the effect of them. The effect of these motions is dilatory, is delay."

Then in the 47th Congress a rule was adopted preventing dilatory motions during the consideration of contested election cases. In 1882 Thomas B. Reed called up a report from the Committee on Rules. The usual filibustering tactics of motions to adjourn

[1] Thomas Jefferson to J. W. Eppes, January 17, 1810, *Writings of Jefferson*, P. L. Ford, ed., IX, 267.

and to adjourn over, followed. At last Reed raised the point of order that dilatory motions could not be entertained by the Chair pending a proposition to change the rules of the House. Speaker Keifer sustained the point on the ground that in the absence of specific direction as to procedure, the constitutional right of the House to determine its rules could not be impaired or destroyed by the indefinite repetition of dilatory motions. Keifer also was ready to count a quorum of members present and not voting, but the time was not ripe. Reed himself had not reached that stage, but, with Robinson of Massachusetts, Kasson, and other leading Republicans, told Keifer they would not sustain him, and so Keifer lost the fame that was to come to Reed.

From this time on the abuse became more and more serious until it threatened to stop the wheels of government. Old conventions were discarded. For instance, up to 1882 it was a point of honor not to use dilatory motions in election cases. Then taking advantage of the great confusion into which the death of President Garfield and the circumstances that followed had thrown their opponents, the Democrats refused to vote in an election case and when a quorum of Republicans was obtained, refused even to let them vote.[1] Under Speaker Carlisle, from 1883 to 1889, no effort was made to stop filibustering. In his last term it reached the extreme of folly, when General Weaver of Iowa blocked all business for nearly two weeks until Carlisle yielded to him. Weaver's program was simple, that of offering two or three motions in rotation. Under the old rules, this was an easy matter. A motion to take a recess and a motion to adjourn to a specified time were, like the motion to adjourn, always in order, and amendment to them could be offered *ad infinitum*. Thus upon a motion to take a recess till eight o'clock, an amendment to make it eight-thirty could be presented, then one to make it nine, and so on.

With the 51st Congress the Republicans came into control of the House again, and now it was the turn of the Democrats to play the same game. Representative Roger Q. Mills of Texas was reported in the New York "Sun," October 7, 1889, as saying: "We do not propose that the Republican majority shall pass a single measure without our consent; in other words, we propose to exercise the control of the House just as much as though we

[1] T. B. Reed, *No. Am. Review*, May, 1890.

were still in the majority, because we know our minority is strong enough to make us the virtual rulers."

The threat was in the way of execution when in January of 1890 Speaker Reed determined to end the intolerable situation. On the 29th he threw the minority into hysterics by counting a quorum. On the 31st he took the revolutionary step of declaring a motion to adjourn out of order. In defense he said on appeal from his ruling: "The object of a parliamentary body is action, and not stoppage of action. Hence, if any member or set of members undertakes to oppose the orderly progress of business, even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have these motions entertained, and to cause the public business to proceed." The appeal was sustained and filibustering in the House of Representatives received a staggering blow.

In the following year it was provided in the revision of the rules that "no dilatory motion shall be entertained by the Speaker." The Democrats dropped this when they came to control the next two Congresses, but the Republicans put it back in 1895, and since then it has been undisturbed. The chief criticism of it has been by reason of the great power it gives the Speaker. To this Asher C. Hinds, the eminent parliamentarian, has replied: "As the approval of the House is the very breath in the nostrils of the Speaker, and as no body on earth is so jealous of its liberties and so impatient of control, we may be quite sure that no arbitrary interruption will take place, and, indeed, no interruption at all, until not only such misuse of proper motions is made clearly evident to the world, but also such action has taken place on the part of the House as will assure the Speaker of the support of the body whose wishes are his law. So that in the end it is a power exercised by the House through its properly constituted officer." [1]

The new rule went a long way, but not the whole distance, for the Constitution prevented, by its giving to one fifth of the members the right to demand the Yeas and Nays upon any division. In the first session of the 60th Congress the Democratic leader, John Sharp Williams of Mississippi, resorted to this very effectively, getting so many roll-calls as to make progress exceedingly slow. The difficulty was met in a measure by special orders from the Committee on Rules, aimed at reducing the number of roll-

[1] *Parliamentary Precedents*, 842

calls, but it will continue to be an obstacle in the way of normal procedure until the House has common sense enough to adopt a system of voting by machine.

The Struggle in the Senate

In the Senate the struggle over closure has been more prolonged, more bitter, more dramatic, and more important even than in the House. There are palpable reasons why drastic rules are necessary in as large a body as the House of Representatives, reasons equally applicable to the House of Commons, but conditions are different in a comparatively small body like the Senate. Of greater consequence, the struggle in the Senate brought out more sharply than in the House a basic problem, as difficult as it is interesting to the student of political science, the problem of whether a minority has in the last resort any rights the majority is bound to respect. Put into terms of conduct, this is the problem of whether there can be a state of affairs in which the minority should have the power to prevent action.

The rules adopted by the Senate in 1789 contained provision for the previous question, and at first it was freely used, but gradually there developed conceptions of dignity and courtesy which led to the belief that unlimited freedom of speech would not be abused. So in 1806 the previous question was dropped and thenceforward due restraint was left to the sense of self-respect.

No serious trouble came until 1841, when Henry Clay was trying to get his fiscal bills through the Senate against the determined opposition of the Democrats. Benton tells the story at length in his chapter (LXIX) on the adoption of the hour-rule by the House of Representatives and Clay's attempt to copy it in the Senate. Clay, we are told by Benton, was impatient to pass his bills, annoyed at the resistance they met, and dreadfully harassed by the species of warfare to which they were subjected; and for which he had no turn. "The democratic Senators acted upon a system, and with a thorough organization, and a perfect understanding. Being a minority, and able to do nothing, they became assailants, and attacked incessantly; not by formal orations against the whole body of a measure, but by sudden, short, and pungent speeches, directed against the vulnerable parts; and pointed by proffered amendments. Near forty propositions of amendment were offered to the first fiscal agent bill alone — the

Yeas and Nays taken on them seven and thirty times. All the other prominent bills were served the same way. Every proposed amendment made an issue, which fixed public attention, and would work out in our favor — end as it might. If we carried it, which was seldom, there was a good point gained: if we lost it, there was a bad point exposed. In either event we had the advantage of discussion, which placed our adversaries in the wrong. There were but twenty-two of us; but every one a speaker, and effective. We kept their measures upon the anvil, and hammered them continuously; we impaled them against the wall, and stabbed them incessantly. Mr. Clay's temperament could not stand it, and he was determined to silence the troublesome minority." [1]

Goaded beyond the point of endurance, Clay, on the 12th of July, 1841, began reproaching the minority with protracting debate to a degree calculated to delay the public business. Calhoun took fire at this rather mild intimation and charged Clay with impugning the motives of the minority. A sharp colloquy followed, with Calhoun forcing the disclosure that Clay thought Senators in opposition were spinning out the time for no other purpose but that of delaying and embarrassing the majority. Thereupon Calhoun practically defied him to bring forward the gag-rule. Clay was ready to take up the challenge, but found his allies would not stand for the House measure. Instead he decided to fasten the previous question on the Senate.

This warmed up the minority. King of Alabama could tell the Senator that peaceable man as he himself was, whenever it was attempted to violate that sanctuary, he, for one, would resist that attempt even to the death. Benton of Missouri said that as the Romans held their natural lives, so did he hold his political existence; the Roman carried his life on the point of his sword, and when that life ceased to be honorable to himself or useful to his country, fell upon his sword and died; so he was willing to do with his legislative and political existence; he was willing to terminate it when it ceased to be honorable to himself or useful to his country; and that he felt would be the case when this chamber, stripped of its constitutional freedom, should receive the gag and muzzle of the previous question. Linn of Missouri in the event of the gag-law wanted its friends to meet him like

[1] *Thirty Years' View*, II, 249.

men; he would do as became him. Calhoun taunted Clay and Senators looked to see what would follow. Mr. Clay rose, leisurely, and surveying the chamber with a pleasant expression of countenance, said the morning had been spent so very agreeably, he hoped the gentlemen were ready to go on with the Loan Bill, and afford the necessary relief to the Treasury. The Loan Bill was accordingly taken up, and proceeded with in a most business-like style, and quite amicably. Enough of Clay's friends had refused to follow him so that he had to throw the project overboard.

Clay's proposals were not talked to death. The first instance of that sort of thing was to come five years later. When President Polk applied to Congress for an appropriation of several million dollars for the purpose of negotiating a treaty of peace with Mexico, Judge Brinkerhoff of Ohio at a conference of anti-slavery Democrats presented what became known as the Wilmot Proviso, stipulating that slavery should not exist in any part of the territory acquired. Wilmot happened to be first recognized by the Speaker to offer the amendment and so gave his name to it. Both sides were surprised when it prevailed in the House. In the Senate Lewis of Alabama moved it be stricken out. The hour agreed upon for adjournment of the session was approaching when Davis of Massachusetts got the floor and spoke against the provision until the arrival of noon ended the chance of action.

After this from time to time for many years attempts were made to reintroduce the previous question, always in vain. Among Senators who urged it or who approved some form of closure were Stephen A. Douglas in 1850; John P. Hale in 1862; Benjamin F. Wade in 1864; Samuel C. Pomeroy in 1869; Hannibal Hamlin in 1870; George G. Wright in 1873. There was, however, no really vigorous attempt to choke off debate until the winter of 1890–91, when the Force Bill brought to pass a filibuster consuming the greater part of two months. The minority talked in relays. Charles J. Faulkner of West Virginia achieved a record with a speech of thirteen hours. James Z. George of Georgia read a book as part of his argument. It is said the carpet between the Senate Chamber and the cloak room was worn to shreds by Senators passing in and out of the room to make and break a quorum. Senators Hoar of Massachusetts and Aldrich of Rhode Island tried to get some form of closure, but in vain, for some of the Republicans were really out of sympathy

with the bill and in the end voted with the minority for its displacement.

The next great filibuster came at the special session of 1893, over the question of repealing the purchase clause of the Sherman Silver Law. The silver Senators talked incessantly. William V. Allen of Nebraska eclipsed the Faulkner record with a speech that, including occasional interruptions, lasted for sixteen hours and a half, and it is said to have been not a rambling speech, but well-connected, logical, and instructive. In the end the filibuster failed, because there was no March 4 near enough at hand. It is both amusing and instructive to read some of the fulminations produced by this episode. For instance, two of America's most notable historians exploded in the "Forum," H. von Holst in the November number, John B. McMaster in that for December. Said von Holst: "The Holy Book tells us of a fool that sold his birthright for a mess of pottage. The Senate of the United States sells not only its rights, but also its sworn duties, and not only these, but also the birthright of the people of the United States, for less — for the ghost of a shadow, euphoniously called the 'courtesy of the Senate.' Let it beware!" And again: "Whatever Senators may think about the dignity and worth of the Senate, the people of the United States cannot afford to let it drift into becoming a worthless, or worse than worthless, body." With much more in the same strain.

The other Professor was not quite so vehement, but was none the less convinced of the thing to be done: "In our day, with larger House and Senate, with greater interests at stake, with this immense volume of business pressing for attention, it is right and necessary that the majority should cut down some of the privileges the minority have so long enjoyed, not by any constitutional or legal guarantee, but by mere consent of the majority. The time for dilatory motions, for refusals to answer roll-calls, for time-consuming debate has gone by." He therefore urged constitutional provision in State Constitutions for a time limit on filibustering, though he did not think such a change in the Federal Constitution desirable, being a matter of detail with which that Constitution ought not to be burdened, nor did he think it possible.

Still another Professor, H. J. Ford, was equally annoyed. He called it "an exhibition of the degradation of the Senate," and said "the privileges of unrestricted debate, which were once re-

garded as opportunities of distinction, have become the intrenchments of particular interests, the shelter of party treachery, and the ready instrument of extortion."[1]

Since then the constitutional necessity of adjourning on the 4th of March in every second year has served the purpose of several tireless talkers. In March of 1901 Thomas H. Carter of Montana defeated the River and Harbor Bill, holding the floor with a speech several hours longer than that of Allen. In 1907 Edward W. Carmack of Tennessee in the same way defeated the Ship Purchase Bill.[2] In other instances an intrepid Senator near the close of the session has by showing his powers of endurance compelled the majority to compromise. Thus in 1903 Senator Tillman of South Carolina carried his point in the matter of a deficiency appropriation bill from which the House had struck out an item for paying his State a war claim. The Senate conferees having agreed it should stay out, Tillman took the floor with a copy of "Childe Harold" and assured his fellow-members he would entertain them by reading from Byron and otherwise until the session ended, unless they would put back the item. They put it back. Senator Burton blocked the River and Harbor Bill in 1914, occupying the floor ten minutes more than twelve hours, in the end compelling changes in the measure to meet his objections.

A filibuster that failed was the one led by Robert M. La Follette of Wisconsin in May, 1908, against the Aldrich-Vreeland Currency Bill. Senator La Follette himself opened the contest by holding the floor for eighteen hours. There were, however, numerous roll-calls that gave him a chance to rest. His chief assistants were Senators Gore and Stone. When Senator Gore had spoken as long as he was able, he sat down thinking to yield the floor to Senator Stone and, being blind, not knowing that Mr. Stone had left the chamber for the moment. The opposition seized the opportunity, called for a vote, and the fight was ended.

The crowning filibuster took place early in 1915 over the Ship Purchase Bill. In its course there were several remarkable performances. Senator Reed Smoot in continuous talking went beyond anything that had ever been known in the Senate, for

[1] *Rise and Growth of Am. Politics*, 270.

[2] Champ Clark, "Is Congressional Oratory a Lost Art?" *Century Magazine*, December, 1910.

though the time he occupied the floor, between eleven and twelve hours, had been surpassed, nobody had spoken with so little interruption. He was not helped by a single roll-call nor a call for a quorum, nor by leaning on his desk for support. He talked steadily and on the bill. Wesley L. Jones of Washington gave almost as striking an example of physical endurance, occupying the floor for thirteen hours, but having a rest of an hour and three quarters. Senator Gallinger of New Hampshire, almost eighty years old, spoke for seven hours and twenty minutes and then declined to leave the chamber for a rest. Two days later he spoke again, for four hours and forty-five minutes. It was in this filibuster that took place the longest continuous sitting of the Senate, from Monday, February 8, at noon, to Wednesday, the 10th, at 6 P.M. The struggle succeeded. Senator Lodge was quoted afterward as attributing success partly to the fact that the Senate was almost equally divided at the start, and partly to the fact that there was no general support for the bill throughout the country, but on the other hand a strong opposition developed.

This filibuster brought near an end the long, slow crystallizing of sentiment against unlimited debate in the Senate. Public opinion, as far as it was voiced in the press, seemed to be almost solidly against filibusters. Yet it took two years and one more filibuster to bring the matter to a head. Then at the close of the 64th Congress, the Armed Neutrality Bill was done to death by the familiar methods, and action on other important matters was prevented. No sooner had the session ended than President Wilson, going farther in his indignation than perhaps he would have gone had he been more deliberate, issued a statement in which he said: "The Senate of the United States is the only legislative body in the world which cannot act when the majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."

Many of the Senators had at one time or another been "willful men," if a share in a filibuster made them such, and they had their own views as to what opinion they represented, but they realized that the public was against them. Some who for many years had stood out against closure now wavered, and presently yielded. As soon as the special session began, the caucuses of both parties endorsed a rule providing that two days after notice in writing from sixteen Senators, the question of closing debate

on a particular bill shall be settled without debate, and if settled in the affirmative by a two-thirds vote the bill shall be held before the Senate until its final disposition, and each Senator shall be limited to one hour's debate in all on the bill itself, amendments to it, and motions arising from it. To prevent endless roll-calls the rule further provides that after the two-thirds vote no amendment may be offered save by unanimous consent. A few Senators preferred a majority vote rather than two thirds; others were still against closure; but the majority were ready for the change, and in the end the resolution prevailed by a vote of 76 to 3. It could hardly be called a drastic rule. Very rarely does either party control two thirds of the votes of the Senate, and on any bitterly contested matter of partisan nature it was believed there would be no stifling of speech under such a rule.

Senator Underwood of Alabama thought it did not go far enough, and in June of 1918 he persuaded the Committee on Rules to recommend that during the period of the war no Senator should occupy more than an hour in debating any bill or resolution, or more than twenty minutes in debating an amendment. He pointed out that the rule as it had been changed was ineffective except for the one purpose of meeting a deliberate, systematic filibuster, and that it did not bring the main question to an issue with fair and just consideration of the questions involved. The Senate proved unwilling to endanger its freedom further, and defeated the proposal by a vote of 34 in favor to 41 against. One result of this was that in the closing days of the session the majority again found itself unable to prevent a small minority from controlling the situation. Three men, each determined to use every expedient open to him for compelling the acceptance of his particular view, blocked the passage of great appropriation bills and other important measures, thus forcing the speedy assembling of the 66th Congress in special session. The closure rule was not invoked, and it looked as if the Senate might never use the weapon it had forged, but the debate upon the Treaty of Versailles was so unconscionably prolonged that at last patience surrendered and on the 15th of November, 1919, the Senate voted, 78 to 16, that the debate be brought to a close. Few of the Senators used much of the hour apiece to which they were still entitled, and four days later a vote was reached.

Closure in some form or other is found in three quarters or more of the State Senates. Usually it is by way of provision for

the previous question, but in a few States it takes the form of making possible the setting of a time for a vote. Thus in New York a motion to close debate may be made after six hours. If it prevails, any Senator may thereupon speak not more than once nor more than half an hour. The motion may be made to include a single question, an amendment or amendments, or the whole matter. The point of no quorum may not be made oftener than once an hour unless the lack of a quorum is disclosed by a roll-call. In the Massachusetts Senate debate may be closed at any time not less than one hour from the adoption of a motion to that effect, and on such a motion not more than ten minutes shall be allowed for debate. In Alabama the Committee on Rules may at any time report a special rule for closing debate. The Iowa Senate occasionally limits debate by amending its rules.

On the other hand the rules of about a dozen of the Senates do not provide for the previous question. In Utah a rule specifically forbids its use. In Connecticut it has been held within a few years that it may not be moved, although in 1863, after a debate carried on for several hours for the evident purpose of delay, the Chair announced he would entertain a motion for proceeding to a vote. Although Georgia has the previous question, the Senate rule says, "No Senator shall be allowed to address himself to any question, and then move to table the bill, resolution or motion, or move the previous question thereon without relinquishing the floor"; and also, "No Senator shall, after debating any question, and before yielding the floor, be allowed to submit any motion, the effect of which shall be to prevent further debate." (The House provides in like fashion.)

It will be seen that there are still a good many opportunities for filibustering in our upper branches, State and National. Even with the stricter rules of the lower branches it is yet possible for a shrewd parliamentarian to interpose many obstacles in the way of action. For this reason the principles involved have by no means ceased to be of vital interest. And much more is to be said in defense of filibustering than is commonly supposed. It is, indeed, one of the features of legislative practice that have received most unfair treatment at the hands of the public. Its case ought to be heard.

Principles and Theories Involved

The foundation of the argument against restriction on debate is

that government exists for the protection of minorities. The strong can look out for themselves. The weak need the protection.

This is not wholly true, but there is enough truth in it to warrant going farther.

De Tocqueville has long been considered as one of the wisest observers who ever studied our institutions. He gave one whole chapter of his famous book to the "Unlimited Power of the Majority in the United States and its Consequences." There you may find him concluding that most of the American Constitutions have sought to increase the natural strength of the majority by artificial means. "The majority in that country exercises a prodigious actual authority, and a moral influence which is scarcely less preponderant," he said. "No obstacles exist which can impede, or so much as retard its progress, or which can induce it to heed the complaints of those whom it crushes upon its path. This state of things is fatal in itself and dangerous for the future. . . . In my opinion the main evil of the present democratic institutions of the United States does not arise, as is often asserted in Europe, from their weakness, but from their overpowering strength; and I am not so much alarmed at the excessive liberty which reigns in that country, as at the very inadequate securities which exist against tyranny. . . . If ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majority, which may at some future time urge the minorities to desperation, and oblige them to have recourse to physical force. Anarchy will then be the result, but it will have been brought about by despotism."

This direful apprehension has not found justification in what has since developed, but that alone would not prove it unfounded. There are many thoughtful men who, in such episodes as that of the Bolsheviki of Russia, find ground for fears that unrestrained majorities may yet prove the downfall of republican institutions.

Most of the American people still think there are certain individual rights, unalienable and inherent, that ought to be respected. They would not admit the proposition that there are no rights which the majority is bound to respect. Whether or not such is the case, another pertinent proposition would hardly be disputed by anybody, the proposition that adequate time ought to be ensured for a mature, well-considered determination

of the popular will. There may be dispute over the number of days or months or years, but that there should be an interval of deliberation would be granted by all sane men.

Experience has shown that the delays produced by filibusters have never permanently prevented action that proved to be wanted by the people. This was the conclusion reached by Senator Hoar of Massachusetts. If his language was rightly recalled by Senator Clarke of Arkansas, who quoted it in the Senate February 17, 1915, from memory of a conversation, Mr. Hoar said: "I have looked along down the history of legislation in this country and the history of filibustering in connection with it, and I have yet to find a single measure that the American people desired to see enacted which was not enacted, and I have never seen one defeated that upon full consideration, and when taken in connection with the unfolding events of history, has not been condemned." He announced a complete reversal of the position he took during the discussion of what was known as the Force Bill, saying: "There was a time in my legislative career when I believed that the absence of a clôture rule in the Senate was criminal neglect, and that we should adopt a system of rules by which business could be conducted; but the logic of my long service and observation has now convinced me that I was wrong in that contention. There is a virtue in unlimited debate, the philosophy of which cannot be detected upon a surface consideration." Another Senator of long experience, Senator Gallinger of New Hampshire, in the same debate also disclosed that he had changed his mind likewise. Still another, Senator Lodge of Massachusetts, gave the story of his own conversion. He had come to the Senate fresh from a great contest in the House where closure was involved, and, as he said, "with a very strong prejudice in favor of vigorous and prompt methods of closing debate." Within a year or two, however, he reached the conclusion that the practice of the Senate was on the whole a wise one, the safest system for the country and for the general interests of the Government.

It may be said that these men became prejudiced by their environment. That could not be charged against Champ Clark. Seventeen years after he first entered the House and the year before he became its Speaker he wrote: "I myself once felt that it would be a good thing if the Senate had a time limit, but I have changed my mind about that, as I have about many things; for I

have come to the conclusion that there ought to be some place in our system of government where measures can be thoroughly discussed, and, while some of the Senators undoubtedly waste time and abuse the privilege of unlimited debate, it is better that a few should do that than that great measures affecting the welfare of ninety millions of people should not be so thoroughly ventilated that a wayfaring man though a fool can understand them." [1]

Senator Burton of Ohio, in February of 1915, set forth with clearness the cases in which he deemed a filibuster not only justifiable but salutary. The first is when a vital question of constitutional right is involved; when a proposition is brought in that a Senator cannot conscientiously support. The second is when the measure is evidently the result of crude or inconsiderate action. "From time to time some bill is sent in here for which a first burst of enthusiasm is aroused. It seems to be all right, but on further and more careful consideration it is found to be faulty and objectionable. Until the people can be heard from, the Senate is justified in holding up the measure." A third justification for a filibuster is when the Senate is convinced that because of some compulsion if a vote is taken it will not express the honest conviction of the members.

In that same February the House gave a practical example of what may happen with closure. Under a drastic special rule, with but six hours of debate (prolonged to nearly twelve by roll-calls to get a quorum), the House passed the Ship Purchase Bill which had not been printed for the information of the members, and on which there had been but a single day of hearings, with only one witness, the Secretary of the Treasury.

The size of the House makes closure there imperative. Otherwise the work of the Nation would never be done. That gives an all-important reason, it has been many times averred, why debate in the Senate should be unlimited. As Carl Schurz put it, there should be one deliberative body in the government in which every question may receive the fullest discussion, and the smallest minority can make itself heard without restraint.[2]

One reason advanced for this is that there ought to be one body free to enlighten public opinion. On great questions exhaustive debate, by men of such intellect as is to be found in the

[1] "Is Congressional Oratory a Lost Art?" *Century Mag.*, December, 1910.
[2] *Henry Clay*, II, 218.

Senate, should lay before the country all the arguments on both sides in utmost detail. Another reason seems to me still more cogent. It goes to the very heart of our institutions and it concerns the most serious and solemn of the motives that determine the conduct of men.

From the beginning of human society the supreme test of faith in principle has been the physical test. Call it brutal, barbarous, anything you please, yet it remains the last resort of all mankind. War is its most terrible illustration. The horrors and miseries of the World War led men to hope that by a League to Enforce Peace we might somewhat lessen the volume of war, yet even the "enforcement" of peace contemplates the use of physical force if needs must be. None but the dreamer imagines that the sword will forever rust in its scabbard.

The filibuster is a physical test. Its success depends on powers of endurance. The instances I have cited where men stood and talked for ten, twelve, fifteen hours or more, were instances of great physical strain, where vitality was endangered, health and even life were risked. It is not the type of daring we usually think of as heroic. Centuries of suffering have attached to heroism the idea of either actual or probable pain, such as that brought by the spear, the knife, the axe, or the flames from fagots. We have come to feel that agony glorifies the deed, and perhaps the mastery of fear is the highest proof men can give of their devotion to principle. Furthermore, there is nothing of the dramatic in the spectacle of an orator endlessly ejaculating or a body of sleepy legislators responding to interminable roll-calls. No pomp or pageantry throws a glamour over the scene. It is distressingly prosaic and verges on the ridiculous. Yet after all it is physical sacrifice and in essence no whit different from trial by battle, the ordeal, the duel, war itself. Do you say the determining of right and wrong by physical sacrifice is folly, with no shred of reason, a disgrace to humanity not deserving one word of defense? Do you say its record should be read with nothing but grief and scorn? Or would you think it better still to blot out that record, lest it might incite misguided youth to emulate countless generations of ancestors in making physical sacrifice the noblest of ideals? Then blot out nine tenths of recorded history. Drop the greater part of the names of the Saints from the calendar. Ask yourself what was the nature and the purpose of the supreme sacrifice made by the founder of the Christian religion.

These may seem somewhat lofty sentiments to invoke in so practical, mechanical a matter as the conduct of parliamentary proceedings, yet we are accustomed to say of the purpose of such proceedings, even though with occasional skepticism, that "the voice of the people is the voice of God," and none but the cynic will smile when we recall the glorious declaration of Wendell Phillips, that "one with God is a majority." It will be a sorry day for liberty when no man imbued with that spirit and inspired by that belief can be found in the halls where the destinies of the world are shaped.

However, the necessary work of government must go on, and as practical men we must agree that ours is a government of majorities, as demonstrated by votes. We start from the premise that majorities must prevail and shall be responsible. There is undoubted force in the argument that whatever interferes with this is abnormal. Samuel W. McCall well said: "Violence is done to the foundation principle of our government, by putting it in the power of a single member [of the Senate] to bring about a paralysis of all legislative functions and to prevent indefinitely the other ninety-one members, and the House of Representatives as well, from transacting the business of the country. The two legislative organs of a great nation must have a procedure which will permit a majority of either in any crisis to assume the responsibility for performing its great part in the necessary work of government." [1]

The very mild and moderate form of closure adopted by the Senate will permit the majority in that body to assume responsibility in time of crisis, and threatens no great harm to minorities. After all, it is in large part a question of degree. Somewhere between the extreme contentions of majority rule and minority right is a point where dangers balance. If the Senate has discovered that point, so much the better. Whether the House has been successful in like discovery is not even yet clear, though almost a score of years have passed since Mr. Reed put forth his famous rules. There is grave reason to fear that a lessening of sense of responsibility has accompanied the limitation of debate, throwing too much of the burden of decision on the Senate. Perhaps the size of the House compels this. If so, it is to be regretted. Mr. McCall thought it undeniable that in the last twenty-five years discussion had been too much restrained in

[1] *The Business of Congress*, 198.

the House of Representatives. "It has been limited," he says, "altogether more than was necessary for the transaction of public business, and it has been limited also too much to secure the fair results of debate. But the limitations have always been by sanction of a majority vote of the members in each case." [1]

The problem has not greatly perplexed the State Legislatures. Pressure of business has not there become so serious as in Washington, and vital issues involving questions of principle rarely arise. Prolonged filibusters have therefore been few in State capitals. Albany saw one half a century ago worth recalling because of the achievement of Andrew D. White, then the youngest member of the Senate, who was to become the President of Cornell. The story goes that he wanted a certain matter referred to a constitutional convention of three hundred members, which was to meet speedily, and in support of his wish he announced his intention of submitting three hundred arguments based on the attainments, character, and general fitness of each of the convention members in turn. It is said he had accomplished about twenty hours of consecutive oratory before the other side capitulated. Such a feat would still be possible where it is the rule that a member who has the floor may keep it as long as he can talk, but fortunately the Legislatures rarely see that rule put to such use.

[1] *The Business of Congress*, 99.

CHAPTER XIII

ORATORY PAST AND PRESENT

In the matter of parliamentary oratory no exception is to be found to the rule that many men, particularly if advanced in years, think yesterday was better than to-day. They would be quite agreed that the golden age of oratory has gone, never to return. Some of them would say there has never since been anything to equal the palmy days of the Roman Senate, when Cicero became the oratorical model for mankind. In the Roman Senate, however, there was no debating proper. A series of set speeches led to decision. Francis Lieber was of the belief that in debating oratory, in replying on the spot vigorously and clearly to an adversary, the best orators of his time and of the preceding century were greatly superior to the ancients.[1]

Records permit judgment in that particular, but it is not so easy to compare the orators of different ages in respect of manner. Some of the legends of orators whom nobody now living heard are equally impossible to refute and to believe. Not a few have been described in language much like that of Ben Jonson in extolling the oratory of Lord Bacon — "The fear of every man who heard him was lest he should make an end." Unless the accounts of Patrick Henry's power are outrageously exaggerated, it neared the supernatural. We have been told how Daniel Webster held his hearers spellbound, how he stirred their deepest emotions, how he swayed them at will. Yet who fails to find the volumes of oratory on his library shelves the dullest and dreariest of all his books? The ponderous sentences, the elaborate periods, the involved rhetoric make it hard to believe that such utterances ever stirred the souls of men. The voice must have given their language life and color, beauty and power, beyond anything the dead words disclose. Perhaps, too, audiences were more sympathetic and emotional than they are to-day. We live in a critical, skeptical age. Perhaps our fathers were not so cold-blooded and cynical as their sons. Certain it is that tastes have changed. We ridicule the man who now indulges in what we sneeringly call "spread-eagle oratory." Bombast no longer delights.

[1] *On Civil Liberty and Self-Government*, 189, note.

England tired of grandiloquence before it palled on us — probably never was so fond of it, for Americans developed unusual aptitude for hyperbole, and it was enjoyed. English taste for a long time favored sonorous, sententious discourses, like those of Burke. It was well after the period of Pitt and Fox when the House of Commons ceased to be an auditorium where eminent men delivered elaborate essays. Then the other extreme was quickly reached. Emerson after his second journey to England, in 1847, wrote in "English Traits": "A kind of pride in bad public speaking is noted in the House of Commons, as if they were willing to show that they did not live by their tongues, or thought they spoke well enough if they had the tone of gentlemen." Yet the transformation could not have been then complete, for it was sixty years later that Henry W. Lucy ("Toby, M.P.") said there had been a great change within even his "comparatively brief experience." He declared that in the Parliament then sitting there was not a man who posed as an orator.[1]

Augustine Birrell said oratory was a tradition of the House. In discussing its disappearance, he failed to recognize that we have been traveling along the same road. "In America," he declared, "you seem still to love talk for its own sake. I am told that in the States grown men and women really enjoy sitting still and being talked to in a loud voice. You love to hear the rolling sentence and the lofty and familiar sentiment. We don't. It cannot be denied that even common juries dislike what a few decades ago would have been considered very passable eloquence. As for our judges, their abhorrence of a full-mouthed sentence is morbid. It is daily growing upon us, this dislike of being talked to in a lofty vein — or, indeed, in any vein. The fact is that most men nowadays can make a speech. There never was a House of Commons either so impatient of speech or containing so many men capable of making a good speech as the present one. But real eloquence will always move, just as a plain-spoken, well-arranged, well-informed, honest speech will always be effective and give pleasure."[2]

It may be that in some localities and under some conditions the grandiose style will be welcome yet, but it has long ceased to

[1] "Reminiscences of the House of Commons," *Putnam's Monthly*, January-February, 1907.

[2] "The House of Commons," *Scribner's Magazine*, November, 1893.

be acceptable in our legislative assemblies. Nearly half a century ago James Parton, describing Congress, wrote: "Flights of oratory generally excite derisive smiles upon the floor of the House, and no man is much regarded by his fellow-members who is addicted to that species of composition." [1]

It seems to be agreed that the change has come about chiefly by reason of the change in the nature and volume of parliamentary business. Whether or not there is less occasion nowadays to discuss general principles, abstract propositions, broad questions of public policy, they furnish relatively a far smaller part of the food for discussion than of old. The enormous increase in the number of technical measures, matters of administrative detail, which call for the conversational form of discussion and make pomposity particularly absurd, has brought a new standard of effective speech. Another result has been to compel brevity. Rarely is there time for exhaustive treatment of any theme. Too many men want also to be heard; too many other things press for attention.

Nevertheless it is not quite true that oratory has disappeared from legislative chambers on either side of the water, if to "oratory" we give its primary meaning — the art of public speech. The form has changed, but the new form is none the less an art in which men may and do excel, by dint of hard work and long practice. "There can be no question," Woodrow Wilson asserted, "that the debates which take place every session in the Senate are of a very high order of excellence. The average of the ability displayed in its discussions not infrequently rises quite to the level of those controversies of the past which we are wont to call great because they furnished occasion to men like Webster and Calhoun and Clay, whom we cannot now quite match in mastery of knowledge and of eloquence." [2]

The "Nation" bore like testimony not so very long ago, and when the "Nation" praises, the rarity of that phenomenon in its columns goes far toward assuring the truth of its averment. "Not only is the worth of Congressional debate held too cheap by the general public," it said, "but the capacity of Representatives and Senators is grievously underestimated. Of course, there are wind bags and dunderheads among them. It is often exasperatingly difficult to get to the real points in issue But when large matters

[1] "The Pressure upon Congress," *Atlantic Monthly*, February, 1870.
[2] *Congressional Government*, 218.

are up and free play is given to intellect, there is as much of it available in Congress as in any place we know." [1]

A competent critic of Parliament, Sydney Brooks, is of the belief that there too good speaking is yet to be found. His knowledge of Washington allowed him to make comparisons. He recalled that the late Empress of Austria used to say she saw more good and more bad riding in the English shires than anywhere else in the world. "Much the same sort of criticism might be passed on Parliamentary eloquence. Some of it is exceedingly good, better, I think, than anything one is likely to hear in Congress; but much of it is atrocious. On the whole, in this, as in so many other spheres of Anglo-American comparatives, I should be inclined to say that while the House of Commons best is better than the Congressional best, the House of Commons average is below the Congressional average." [2]

The trouble with such comparisons is that there is no standard by which to measure. Men are not in agreement as to what constitutes good speaking.

There is but one essential quality — a man must speak so that he can be heard. It is a rare quality, for an astonishing number of speakers neglect its cultivation. This is particularly noticeable among clergymen, who would be expected to recognize the fundamental requirement in the art on which chiefly depends their usefulness. When those with whom speaking is the customary and continuous means of livelihood so often fail to enunciate properly, surely such novices as most of the members of legislative bodies can be forgiven if many of their syllables disappear. It is not a matter of volume or quality of voice, but wholly of giving due weight to every vowel and every consonant. The use of the telephone should have taught this. The person who speaks distinctly in a low tone is better heard than the person who shouts but uses only part of the letters. More men in an audience are slightly deaf — "hard of hearing" describes it better — than is commonly supposed. They are vexed by the smothered syllables. Furthermore, the mental effort required of the listener in filling the gaps of sound diverts the attention from the argument, just as it is diverted by any untoward incident.

If a speaker is willing to enunciate distinctly, he may succeed without the help of a single one of the graces of oratory. There is

[1] *The Nation*, February 17, 1910.
[2] "The House of Commons," *Harper's Weekly*, March 5, 1904.

not one of these graces but has been lacking to some great orator. Some of the famous have had raucous voices; others have been awkward in gesture; still others have had a limited vocabulary, have lacked the power of imagery, have abounded in solecisms. Of course these and like defects are handicaps. Men would speak better without them. But they are not insuperable obstacles.

If a timorous reader, more than ever conscious of his shortcomings after perusing one of the familiar accounts of great speeches, would revive his courage by a glimpse at the other side of the shield, rarely shown, let him turn to George W. Julian's "Political Recollections" and learn how Daniel Webster's famous Seventh of March Speech affected one observer not entranced. Julian says Webster's oratory was to him a perfect surprise and curiosity. Mr. Webster spoke not only with very unusual deliberation, but also with pauses having no relation whatever to the sense. His sentences were broken into the oddest fragments, and the hearer was perplexed in the endeavor to gather his meaning. In declaring, for example, that he "would put in no Wilmot proviso for the purpose of a taunt," etc., he made a long pause at "Wilmot," perhaps a half a minute, and finally, having apparently recovered his breath, added the word "proviso"; and then, after another considerable pause, went on with his sentence. His speaking seemed painfully laborious. Doubtless the circumstances of that address accounted in part for its manner of delivery, but at least the description may show that even the greatest of orators are not without flaws, at any rate at times.

Matter and Manner

In a legislative assembly, matter counts for more than manner. The fortunate possessor of the bell-like voice with a *timbre* delighting the ear, the skillful elocutionist, the master of good English — all are helped by their natural or acquired powers to get a hearing, but it amounts to little or nothing unless something worth hearing is said. Members are satiated with words. As mere entertainment, language palls. Facts and ideas are what they want. The result is that the most effective speaker in such an assembly is the man who knows the most about the subject and reasons upon it the most logically. Strong minds, well-equipped, come to the top more surely and speedily in legislative assemblies than anywhere else on earth. Very few have been the

enduring legislative reputations made by men of mediocre ability.

That very acute student of English history, W. E. H. Lecky, has undertaken to meet the contrary belief, entertained by those who decry parliamentary institutions as being simply government by talking, and who assert that mere rhetorical skill will always be more valued in them than judgment, knowledge, or character. He declares it perfectly untrue that parliamentary weight has in England been usually proportioned to oratorical power. The two Pitts and Mr. Gladstone, he says, are the three examples of speakers of transcendent power exercising for a considerable time a commanding influence over English politics. "The younger Pitt is, I believe, a real instance of a man whose solid ability bore no kind of proportion to his oratorical skill, and who, by an almost preternatural dexterity in debate, accompanied by great decision of character, and assisted by the favour of the King, by the magic of an illustrious name, and by a great national panic, maintained an authority immensely greater than his deserts. But in this respect he stands alone." [1]

In the minor legislative assemblies, no less than in Parliament or Congress, it is almost invariably the case that the real power is wielded by the strong men. And the most useful element of strength is character. It is remarkable how quickly and accurately such a body as the Massachusetts House of Representatives, for instance, will "size-up" its more conspicuous members. Within a month it will have passed judgments almost invariably unerring. It knows whom it can trust and whom it cannot trust. Hardly a House fails to contain one or two men of brilliant parts to whom the House will listen with pleasure and to whose arguments it is wholly indifferent. But let the floor be taken by a man the House knows to be honest, sincere, intelligent, and informed — then votes are changed. My own observation in this respect was in complete accord with that of Mr. Lodge, who was there before my time. He, too, found the House with a surprisingly quick ear for a false note. Said Mr. Lodge: "It detects insincerity with wonderful acuteness. I recall a member whom at first I greatly envied for his force and fluency in debate and for his readiness and boldness in retort. Yet I saw his influence gradually fade away despite his marked ability. The explanation was that the House made up its mind that he was sincere only for the moment, and that he had no genuine conviction on any

[1] *England in the Eighteenth Century*, I, 391.

subject. It was a matter of instinct, for there was no direct evidence on the point. The House listened to this member, enjoyed his keenness and his power in argument, but would not be guided nor influenced by him. Some years after, events showed his fellow-members had judged him rightly." [1]

An American Legislature will not tolerate deception. Nowhere is it more dangerous to misrepresent. Almost always some other members are as well informed on the subject as the man speaking. When the thing misrepresented is that which all have heard, the attempt to deceive is particularly foolish. For this reason there is no need of such a rule as one adopted for the Pennsylvania Assembly of 1703, which directed "that no member endeavour to pervert the Sense of another's Speech." He who tries that nowadays will lose more than by any possibility he can gain.

In respect of happenings outside the House, there is great risk in making assertions that cannot be verified. Hugh McCulloch recalls a case where this cost a Congressman the confidence of the National House. Richard Fletcher had recently come from Massachusetts with a distinguished reputation for his legal acquirements and acumen. He asserted that a bill under discussion had been prepared word for word in the White House, and not by the committee which reported the bill. This was denied by some members of the committee, in language stronger and more personal than was parliamentary. Called upon for proof, Mr. Fletcher was unable to make good his assertion, and, in the estimation of the House, was convicted of making a statement for which he had no warrant. Mr. McCulloch also recalls that Rufus Choate, in the Senate, failed to meet the expectation of his friends, but for a quite different reason. "In an altercation with Mr. Clay," says McCulloch, "he quailed before the great Kentuckian, and was consequently supposed to be deficient in pluck, which defect was in those days, and is still, fatal to a man in public life. A person who witnessed the altercation said to me: 'Choate was one of the ablest men in the Senate. If he had knocked Mr. Clay down instead of quailing before him, he would have been a Webster.' " [2]

Still another source of failure in Congress has been described by James G. Blaine, in the case of Henry J. Raymond, founder

[1] "A First Term in the Legislature." *Youth's Companion*, January 10, 1889.
[2] *Men and Measures of Half a Century*, 21, 22.

and editor of the New York "Times," a man of acknowledged talents. His courteous manners, his wide intelligence, his generous hospitality, gave him a large popularity, but he never recovered from his overwhelming defeat in the debate on reconstruction in the 39th Congress, where he defended President Johnson's policy. "The fate which befell Mr. Raymond," says Blaine, "apart from the essential weakness of the issue on which he staked his success, is not uncommon to men who enter Congress with great reputation already attained. So much is expected of them that their efforts on the floor are almost sure to fall below the standard set up for them by their hearers. By natural reaction they receive, in consequence, less credit than is their due. Except in a few marked instances the House has always been led by men whose reputation has been acquired in its service. Entering unheralded, free from the requirements which expectation imposes, a clever man is sure to receive more credit than is really his due when he is so fortunate as to arrest the attention of members in his first speech. Thenceforward, if he be discreet enough to move slowly and modestly, he acquires a secure standing and may reach the highest honors which the House can confer." [1]

The most famous instance of power thus gradually acquired is that of Charles James Fox. Edmund Burke has told us it was by slow degrees and constant discussion that Fox became the greatest parliamentary debater the world ever saw. Entering the House of Commons at twenty, he remained until his death at the age of fifty-seven, building up his influence during all that time.

Speeches and Lawmaking

It is to be observed that in these comments on oratory and orators, reference has for the most part been made to the last half of the eighteenth and the first half of the nineteenth century. Undoubtedly it was the Golden Age of eloquence in the English language. Are we to infer that eloquence is no longer effective in lawmaking? There are those who so think. The belief is not recent. As long ago as 1867 a writer in the "North American Review" declared: "Legislative debates are becoming every year in every country of less and less consequence. In the English Parliament debating powers are now of very little value compared with what they were fifty years ago. Votes are rarely changed by

[1] *Twenty Years of Congress*, II, 139.

speeches. This may be said with still greater accuracy of votes in Congress." [1] Lord Salisbury, speaking at Edinburgh, October 20, 1894, said: "There is an enormous change in the House of Commons as I recollect it, and the evolution is going on still; and we have reached this point — that discussion of a measure is possible in the Cabinet, but for any effective or useful purpose it is rapidly becoming an impossibility in the House of Commons." More recently Sidney Low has intimated that all the oratory of Westminster will not change half a dozen votes one way or the other.[2]

Lord Robert Cecil told the Select Committee on House of Commons Procedure in 1914 that during the last two centuries the House had been gradually becoming less and less a deliberative assembly, and that though down to a comparatively recent time there was always a fair chance of inducing the majority to agree with you, now there is very, very little. He thought the great evil of the present House of Commons to be the unreality of its discussions; and he thought this arose from the neglect of the vital principle of all deliberative assemblies, namely, that the normal minority must be occasionally in a majority. That is to say, a deliberative assembly, to have any vitality, must be so constituted that every reasonable opinion has some chance of adoption. The object of debate is to convince, and if it is at the outset made impossible, under any circumstances, for conviction to follow debate, then debate becomes useless, and consequently unreal; and this is the actual condition of affairs in the House of Commons whenever it is discussing a Government measure. In practice, on any Government bill of the first rank every amendment is treated as a question of confidence by the Government, the Government's whips are put on, and any member of the majority who votes against the Government does so to some extent at his peril. Members do not listen to the debates, but go and sit elsewhere, because they know that they have practically to vote one way or the other, whatever they may feel, and therefore the thing is utterly tedious and uninteresting.

We are constantly told that the day of the orator in Congress has gone. For example, Bryce, most capable of observers, even a generation ago concluded that the House of Representatives was not a debating body. He found that one subject alone, the sub-

[1] "The Tyranny of the Majority," *No. Am. Review*, January, 1867.
[2] *The Governance of England*, 75.

ject of taxation and appropriation, received genuine discussion by the House at large. As to the State Legislatures, what O. K. Patton says about Iowa may be taken as typical. He believes the most casual observer would notice that there is very little effective debate in either branch. "There is a great deal of discussion in both bodies, but only on occasions is the debate ever followed by the whole House. Furthermore, upon the most important measures the members are reached outside the legislative hall before the bill has come up for debate and no amount of discussion is likely to change their vote, since their minds, in most cases, have already been made up. Upon the less important measures, however, members will follow the brief remarks of the member who has the bill in charge, especially where they have given the matter no thought and want to cast an intelligent vote or be able to explain their vote after it is cast. With minor measures, nevertheless, more depends upon the person handling the proposition than upon its merits. Thus debate in these cases becomes a matter of information rather than of argumentation." [1]

It is hard to tell just how much of these allegations about the disappearance of useful argument in the assemblies of England and America is due to the pessimism of men who always think theirs an age of degeneracy. Some of these men think Wisdom fled the world when they were born — an apprehension not wholly baseless if they themselves are to furnish the test. Others fail to recognize that change is not necessarily deterioration. In this instance it must be admitted that there has been change, though perhaps not to anything like the degree often averred. Has it been a change for the better?

Debate has almost universally been deemed an indispensable preliminary to wise decision. That is a truism hardly worth stating were it not for the tendency nowadays to depreciate parliamentary debate, to hamper and curtail it, even to urge its abandonment. Yet all human experience shows the wisdom of deliberate argument before joint action. Nothing more generally appears in the history of all peoples, whether barbaric or civilized, ancient or modern, not under the sway of a despot. Up to our own time it has been thought a fundamental of representative government.

Can it be that we have outgrown the use of argument? Should our lawmaking bodies be changed into voting devices?

[1] *Statute Lawmaking in Iowa*, 248.

Was Carlyle justified in his bitter sneer at Parliaments as "talking-shops?" Are we discreet in ridiculing the flood of oratory in Congress and our Legislatures? Has the human voice lost its value as an instrument for informing, persuading, convincing?

No, that is not true. Conditions have changed. Methods have changed. But public argument is still a mighty power. In the halls of legislation it still serves a most important purpose. Perhaps directly it determines votes less than of old, but indirectly it still shares in deciding the course of action. Its mastery is stoutly contested by the press. The editor rivals the orator. The intellect divides its attention between the written word coming through the eye and the spoken word coming through the ear. Neither is supreme. Each has its part.

In England, debate still shares in moulding opinion, and though that opinion no longer expresses itself in votes cast in Parliament as a result of independent conclusion, it does in the long run shape the course of affairs through its influence on the elected autocracy that governs — the Cabinet. As Ilbert says, it must be repeated that Parliament does not govern, and is not intended to govern. "A strong executive government, tempered and controlled by constant, vigilant, and representative criticism, is the ideal at which parliamentary institutions aim." And as bearing on this he declares: "Nothing clears the air more effectually than a good parliamentary debate, or reveals more distinctly the currents of popular feeling and public opinion, and the force with which they flow. Of the results of such a debate the division list is a very imperfect and fallacious test. The arguments and attitude of minorities and of individual members are factors of the greatest importance in determining the action of the government." [1]

Woodrow Wilson, who thinks the functions of Congress should be more assimilated to those of Parliament, has spoken with approval of "watchful criticism" as the purpose of Parliaments — talk that shall bring to light the whole intention of the Government and apprise those who conduct it of the feeling and desire of the Nation. To this end he urges discussion by the sovereign legislative body, "a discussion in which every feature of each mooted point of policy shall be distinctly brought out, and every argument of significance pushed to the farthest point of insistence, by recognized leaders in that body; and, above all, a dis-

[1] *Parliament*, 119.

cussion upon which something — something of interest or importance, some pressing question of administration or of law, the fate of the party or the success of a conspicuous politician — evidently depends. It is only a discussion of this sort that the public will heed; no other sort will impress it."[1]

Long before he became President Mr. Wilson concluded that public opinion could not be instructed or elevated by the debates of Congress, not only because there were few debates seriously undertaken by Congress, but principally because no one not professionally interested in the daily course of legislation cared to read what is said by the debaters when Congress does stop to talk, inasmuch as nothing depends upon the issue of the discussion. "The ordinary citizen," he said, "cannot be induced to pay much heed to the details, or even to the main principles, of lawmaking, unless something else more interesting than the law itself be involved in the pending decision of the lawmakers. If the fortunes of a party or the power of a great political leader are staked upon the final vote, he will listen with the keenest interest to all that the principal actors may have to say, and absorb much instruction in so doing; but if no such things hang in the balance, he will not turn from his business to listen."[2]

That was true enough in the piping times of peace, but probably Mr. Wilson himself would admit that when vital problems of international relations came to the front, leading to war, the people once more showed themselves willing to listen to arguments on measures where the fortunes of men were the minor matter, and that the debates in Congress once more did help to mould public opinion. After the war, when the Senate dissected the Treaty of Versailles, the opinion-shaping power of a great debate was demonstrated to a degree hardly to be matched in all history. Then it was that Mr. Wilson's description of the virtues of a deliberative assembly found complete vindication. He was explaining why such an assembly seldom acts half so radically as its several members professed themselves ready to act before they came together into one place and talked the matter over and contrived statutes. "They have really for the first time laid their minds alongside other minds of different views, of different experience, of different prepossessions. They have seen the men from whom they differ, face to face, and have come to understand how honestly, and with what force of genuine

[1] *Congressional Government*, 85. [2] *Ibid.*, 101.

character and disinterested convictions, or with what convincing array of practical arguments opposite views may be held. They have learned more than any one man could beforehand have known. Common counsel is not aggregate counsel. It is not a sum in addition, counting heads. It is compounded out of many views in actual contact; it is a living thing made out of the vital substance of many minds, many personalities, many experiences; and it can be made up only of the vital contacts of actual conference, only in face to face debate, only by word of mouth and the direct clash of mind with mind."[1]

Because the Senators of the United States learned more than any one man could beforehand have known, and because of the benefits of common counsel, and because of debate, the people of the country changed their minds about the Treaty of Versailles.

It is, however, possible greatly to exaggerate the influence of public opinion on lawmaking as a whole, and thereby to obscure a most important function of debate, that of shaping votes to which public opinion has little or no relation. To illustrate, turn again to the "North American Review" writer already quoted. He wrote half a century ago, but the growth in the influence of the press has made such views and arguments as his even more common to-day. "The multitude of books and periodicals is so great," he maintained, "that no question of morals or politics or religion can ever present itself without its being instantly analyzed, turned over, and examined in every possible light by thousands of writers, whose observations are laid before the public within a few hours of their appearance in print, and become the theme of discussion in every household. Everybody has something to say upon them, and says it with a knowledge of the facts and arguments which a century ago only a very few could boast. The consequence is, that a measure of importance is rarely introduced into Congress until the principles upon which it is based have received a thorough sifting at the hands of the public, and until every member of the legislature has read in his home every argument that can be produced for or against it. His speech in the House is simply a *pro forma* rehearsal of propositions with which everybody is familiar, and on which nearly everybody's mind is made up. The other members are sure to have heard them, and to have come to a decision as to their value. Legislatures in our day are, therefore, rather machines for giving expres-

[1] *Const. Govt. in the U.S.*, 104.

sion to the popular will, than real lawmakers. The judgment is formed by the country, the legislature simply registers it."[1]

The trouble with this is that it is not true. The public at large never discusses or knows anything about a tithe of the measures before Congress or any State Legislature. The public interests itself in a few simple propositions, as far as they are non-technical, partisan, and affecting with some directness the daily lives of the people. It cares nothing for the great mass of administrative detail that now unfortunately and unnecessarily burdens lawmakers. It pays little attention to many of the fundamental problems. Far the greater part of the decisions within the walls of our capitols must be reached as a result of what is there said, either in committee room or in chamber. For this reason argumentative speech is inevitable, necessary, and wise.

The common charge that nearly all of debate is a waste of time, useless garrulity, vain mouthing, is based on a complete misconception of both the purpose and the nature of legislative argument. Those who make the charge are misled by the fact that few of the debaters are great men, few of the speeches are of any value away from the conditions surrounding their delivery, few of the topics interest an outsider. Yet those who have actually voted with the guidance of these speeches know they are for the most part helpful and profitable. Judge Jameson appraised them accurately in his learned work. To be sure, he was writing only of debate in Constitutional Conventions, but what he said is equally true of much that is spoken in Legislatures and Congress. "When measures are under deliberation, which rest on principles alone," he wrote, "the opinions of commonplace men are frequently of as much value, and are likely to be quite as original, as those of the more gifted debaters. At all events, it is eminently useful to a public assembly to listen to the observations upon any subject, of many men of various callings and unequal attainments. If their thoughts are not generally profound, they are often suggestive; and, in a deliberative body, it is not so much the remarks of those who speak, as the reflections upon them of those who listen, which ripen into measures. The truth of this is seen in perusing the printed reports of the debates in our Conventions. One cannot go through the discussion of any important measure, in which men of ordinary minds participated, without being surprised to find fresh light constantly flowing over

[1] "The Tyranny of the Majority," *No. Am. Review*, January, 1867.

the subject from speeches, which not all the polishing of the reporter could make otherwise than offensive to a cultivated taste.'[1]

To this let me add sage conclusions reached by Samuel W. McCall after long experience in Congress. "The ultimate object of legislation," he points out, "is to attain results, and these are accomplished by voting, but the importance of results has sometimes been exaggerated compared with the importance of the steps which should properly precede action and make it wise when finally reached. No action at all is preferable to ill-considered action, and calm and deliberate argument is an important safeguard against motion in the wrong direction. A legislature, just as an individual, may be the victim of impulsiveness, if action precedes reflection. The right of debate in the abstract is one of the fundamental things in the constitution of parliamentary bodies. In our system of government the making and the enforcement of laws, the reaching of verdicts of juries, and the decisions of the courts are based upon discussion as an important step."[2]

History tells of one momentous occasion when a lawmaking body nobly and boldly refused debate, but to no purpose. Silence ratified that part of the second partition of Poland which was veiled under the pretense of a treaty with Prussia. Four of the Deputies to the Diet of Grodno were arrested. It was on the afternoon of the 23d of September, 1793, that the news was announced to the Diet. The remaining Deputies resolved to transact no business until their colleagues were freed. Silence reigned in the hall for hour after hour. Midnight came, then one o'clock, and still no one spoke. At two o'clock no word had been uttered. Three o'clock came and with it a threat from the Russian General to call in the grenadiers. The Marshal of the Diet then put the question of approving the Prussian Treaty. No one voiced a word. He repeated the question a second time. Still not a word from any Deputy. "Silence gives consent," at last said the Marshal, and Poland received the second of her fateful wounds.

In Congress the experiment of meeting a minority with silence was tried early. Before the debate on the Alien and Sedition Laws in 1799 the Federalists determined in caucus that nothing should be spoken on their side, but could not control themselves and went to the opposite extreme with tumult. Three years later the boot was on the other leg. The Republicans, now in the ma-

[1] *The Constitutional Convention*, 417. [2] *The Business of Congress*, 98.

jority, remembered the bad example. Gallatin's financial scheme was under consideration. The Federalists, who were better men of business and more formidable debaters than the Republicans, offered the usual opposition and asked the ordinary troublesome questions. To stop the debate by silencing the minority was impossible, and therefore Randolph and his friends undertook to stop debate by silencing themselves, answering no questions, listening to no criticisms, and voting solidly as the Administration directed. "Such a policy," as Henry Adams comments, "has long since proved itself to be not only dangerous and dictatorial, but blundering, for it gives an irresistible advantage of sarcasm, irony, and argument to the minority — an advantage which the Federalists were quick to use. After a short trial the experiment was given up. The Republicans resumed their tongues, a little mortified at the ridicule they had invited, and in future they preferred the more effective policy of gagging their opponents rather than themselves."[1]

Occasionally in a State Legislature, particularly in Senates, the word will be passed round — "Don't talk; vote." This almost always is bad policy, in the end reacting to the injury of those whom it silences. Frank, full discussion is the wiser course. It is a necessity for good lawmaking.

To be sure, where party spirit runs high, it may seem as if debate very rarely changed determinations reached by the majority in caucus or imposed by party leaders. This overlooks changes in detail, secured by amendments, often approaching in importance the main question itself. The Massachusetts Convention of 1917 gave a striking illustration of this. A clear majority of its members came with the definite and for the most part the avowed intention of favoring some form of the Initiative and Referendum. The opposition fought hard and long and well. After about sixty speeches more or less formal on the main issue, which accomplished next to nothing, many days were devoted to the discussion of amendments. The result was that the sponsors of the measure themselves made numerous changes, and were compelled to accept others by the votes of the open-minded men who held the balance of power, with the result that the measure adopted was in some vital particulars and in many points of detail essentially different from that which had been introduced. It was a vindication, not of oratory, but of debate.

[1] *John Randolph*, 72.

In that very large proportion of the work of our legislative assemblies which is not partisan, the logical argument, happily presented, still brings results. When George F. Hoar was in the Massachusetts House, he found "there was a time, when the opinion of the House seemed to be precipitating or crystallizing, not too early in the debate and not too late, when a vigorous and effective speech had great influence." [1] That was years ago, but it is still true. Let no man delude himself with the idea that the spoken word no longer influences legislation.

Freedom of Debate

Freedom of parliamentary speech is one of the bulwarks of Anglo-Saxon liberties. It was achieved by centuries of struggle against royal prerogative. The story of it goes as far back as the time of Richard II, when Michael de la Pole, Earl of Suffolk (who had been Lord Chancellor of the kingdom), the Duke of Ireland, and the Archbishop of York, having abused their power by carrying on designs that were subversive of public liberty, were declared guilty of high treason. Among opinions to help them given by the judges in response to a string of questions drawn up by Sir Robert Tresilian, Chief Justice of the King's Bench, was one tending to annihilate, at a single stroke, all the rights of the Commons, by taking away the important privilege of starting and freely discussing whatever subjects of debate they might think proper. The Commons were to be restrained, under pain of being punished as traitors, from proceeding upon any articles besides those limited to them by the King. All those who had a share in the declarations of the judges were attainted of high treason. Tresilian and Bembre, who had been Mayor of London, were hanged; the others were only banished, at the intercession of the Bishops. [2]

In the same reign one Haxey wrote a petition against the extravagance of the court. Upon complaint by the King he was condemned to death as a traitor, but was reprieved. The first Parliament of Henry IV declared the complaint and condemnation a breach of law and privilege. Such spirit became rare when Parliament declined in the sixteenth century. Privilege of speech, says Hatsell, was frequently cavilled at by the courtiers in the reigns of Queen Mary, Elizabeth, and James, when they thought

[1] *Autobiography*, I, 186.
[2] De Lolme, *The Constitution of England*, bk. II, chap. 16.

it trenched on the royal prerogative, and in general the House acquiesced in this doctrine. The friends of prerogative inveighed against "some tribunes of the people whose mouths could not be stopped"; declared that "a member must not speak what and of whom he list"; and threatened "those idle heads that would meddle with reforming the church and transforming the commonwealth."

With the rise of Puritan independence of thought came new assertion of parliamentary privilege. The King's habitual assumption that there were various important matters of state, such as the laying of impositions and the conduct of foreign relations, that Parliament had no right so much as to discuss, led it to declare in May of 1610: "We hold it an ancient, general, and undoubted right of Parliament to debate freely all matters, which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved." [1] Ten years later the issue was squarely joined by a Parliament to which, as Lord Russell well says, every Englishman ought to look back with reverence. Having first voted the King two subsidies, and having discouraged all recurrence to past complaints, they set themselves to examine vigorously the present grievances of the subject. James adjourned them, and imprisoned Sir Edwin Sandys, one of their most useful members. Undismayed by this step, they petitioned the King, on their next meeting, to defend his son-in-law, the Elector Palatine, against the Catholic interest of Europe, to break off the match of his son with Spain, and to turn his sword against that formidable power. James threatened the Commons with punishment; they maintained their privileges. He told them these were derived "from the grace and permission of our ancestors and of us." To this pretension they returned the following memorable answer:

"The Commons, now assembled in Parliament, being justly occasioned thereunto, concerning sundry liberties, franchises, privileges, and jurisdictions of Parliament, do make this protestation following: — That the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and the arduous and urgent affairs concerning the King, State, and the defence of the realm, and of the Church of England, and the mak-

[1] Commons' Journals, I, 431.

ing and maintenance of laws, and redress of mischiefs and grievances, which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament; and that in the handling and proceeding of those businesses, every member of the House hath, and of right ought to have, freedom of speech, to propound, treat, reason, and bring to conclusion the same; that the Commons in Parliament have like liberty and freedom to treat of those matters in such order as in their judgments shall seem fittest; and that every such member of the said House hath the freedom from all impeachment, imprisonment, and molestation (other than by the censure of the House itself) for or concerning any bill, speaking, reasoning, or declaring of any matter or matters, touching the Parliament, or Parliament business; and that if any of the said members be complained of and questioned for anything said or done in Parliament, the same is to be showed to the King, by the advice and consent of all the Commons assembled in Parliament, before the King give credence to any private information."

James, greatly wroth at this proceeding, sent for the Journal of the House of Commons and tore out the protestation with his own hand. He dissolved the Parliament; he imprisoned Coke, Selden, Pym, Phillips, and Mallory, all members of the dissolved House of Commons. He was not aware that the force of the protestation he tore out was not in the parchment or the letters of a book, but in the hearts and minds of his subjects; and he little expected that, by confining the persons of a few commoners, he was preparing the imprisonment and death of his son.[1]

In the first session of his first Parliament that son, Charles I, proceeded to attack the freedom of debate. His onslaught culminated when two free speakers, Sir Dudley Digges and Sir John Eliot, were beckoned out of the House, on pretense of a message from the King, and committed to the Tower, Charles avowing the act. The boldness with which the House asserted their indubitable and essential right of freedom of speech, and the personal freedom of the members, and their decision in refusing to proceed on any business till their leaders, Sir John Eliot and Sir Dudley Digges, had been discharged, saved the liberties of England. The very day that Sir John Eliot had concluded his

[1] John, Earl Russell, *An Essay on the Hist. of the English Govt. and Const.*, ed. of 1866, 34–36.

harangue with the memorable peroration, "My lords, I have done, you see the man," Charles came in his barge from Westminster Hall, with Buckingham by his side, to order Eliot to the Tower. The House of Commons broke up instantly. The next morning, when the Speaker reminded them of the business of the day, "Sit down, sit down!" was the general cry. "No business until we are righted in our liberties!" In vain did Sir Dudley Carlton, Vice-Chamberlain of the Household, reason with the House on what he termed their refractory silence, and declare his opinion that "the greatest and wisest part of a Parliament are those that use the greatest silence, so as not to be opinionative or sullen." They would not be moved from their moody silence, till, after eight days' struggle, Sir John Eliot was released by royal warrant.[1]

Eliot, Holles, and other eminent members were committed and their papers seized, after the dissolution of Parliament. The Attorney-General exhibited an information against Eliot for words uttered in the House; and against Holles and Valentine for a tumult on the last day of the session. Eliot, the most distinguished leader of the popular party, died in the Tower without yielding the submission required.

His sufferings were not to be in vain. Among their memorable results was a resolution by the House of Commons in 1667, in which the Lords concurred, that the judgment against Eliot, Holles, and Valentine was an illegal judgment, and against the freedom and privilege of Parliament. At the same time it was resolved that the act of Henry VIII, passed when Strode had been prosecuted and imprisoned, for proposing in Parliament some regulations for the tinners in Cornwall, was a general law, "extending to indemnify all and every the members of both Houses of Parliament, in all Parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of, and is a declaratory law of the ancient and necessary rights and privileges of Parliament." Thus, Hallam says, was established beyond controversy the great privilege of unlimited freedom of speech in Parliament. With the Bill of Rights in 1689 it was firmly embedded in the English Constitution. Said that memorable Act: "The freedom of speech, and debates or pro-

[1] W. C. Townsend, *History of the House of Commons*, I, 278, quoting Forster's *Life of Sir John Eliot.*

ceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

It was hardly to be expected that King James or his son would recognize the privilege in any colonial charter. Nothing bearing on it appears in America until the firm stand of Parliament under the second Charles found reflection in the Concessions of West Jersey, in 1669, which declared that "in every general free assembly every respective member hath liberty of speech." The formal declaration of the rights and privileges of Massachusetts, approved by both Representatives and Councillors at their first meeting under the new charter, in 1694, said "that they had an undoubted right to all the liberties and privileges of an English assembly, and to have freedom of debate and suffrage, as the Commons of England have." If the early colonial Governors interfered much with their Legislatures in this particular, it is probable that some provision about it would have been put in the frames of government, such as those of Connecticut or Pennsylvania, which the people had a share in creating.

In 1728 a declaration was formally made by the New York Assembly, that "for any act, matter or thing done in General Assembly, the members thereof are accountable and answerable to the House only, and to no other persons whatsoever." This was primarily for the benefit of the Council and the Governor. However, the colonists as a whole were not disturbed enough in this respect to make it probable that the pronouncements in our State Constitutions were mainly due to personal experience. It is more likely that they were copied from the English Bill of Rights on general principles. Yet while our early Constitutions were in the making, there was at least one episode emphasizing the need of declaration, for in June of 1777 one of the members of the Congress of the Confederation was challenged for words spoken in debate, whereupon it was resolved that "Congress have, and always had, authority to protect their members from insult, for anything by them said or done in Congress in the exercise of their duty, which is a privilege essential to the freedom of debate, and to the faithful discharge of the great trust imposed in them by their constituents."

The Bill of Rights in the Virginia Constitution spoke emphatically, declaring "that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments." Maryland was more specific in repre-

senting the real danger, for it said: "Freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature." Massachusetts put it more strongly: "The freedom of deliberation, speech, and debate, in either House of the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."

New Hampshire in 1784 and Vermont in 1786 copied the Massachusetts declaration word for word.

The Federal Convention preferred the way it was phrased in the English Bill, and said Senators and Representatives "for any speech or debate in either House, shall not be questioned in any other place." This form has been the more common in the Constitutions since framed, but a variation appears in what was said by Wisconsin in 1848: "No member of the Legislature shall be liable in any civil action or criminal prosecution whatever for words spoken in debate." Nebraska and Washington copied this.

Massachusetts also put in her Constitution of 1780 a declaration that House and Senate should have authority to punish by imprisonment every person "who, in the town where the General Court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for anything said or done in the House; or who shall assault any of them therefor." New Hampshire, copying much from Massachusetts, omitted the reference to "anything said or done in the House." Maine, however, put it in, slightly changed, to "anything said, done, or doing in either House." South Carolina, in 1790, copied Massachusetts, omitting the phrase "in the town where the General Court is sitting." West Virginia omitted all restriction and gave each branch power to punish "for any assault, threatening, or abuse of a member for words spoken in debate, . . . but such imprisonment shall not extend beyond the termination of the session, and shall not prevent the punishment of any offence by the ordinary course of law."

There is an interesting story of the failure of John Randolph to get revenge by invoking the protection of the Federal Constitution. Soon after he first took his seat in Congress, he made a speech, in January, 1800, on a motion to reduce the army, in the course of which he freely used the stinging epithets that made him famous and feared. At the theater in the evening two young

marine officers came into the box behind Randolph and his friends, and made remarks, not *to* Randolph, but *at* him: "Those ragamuffins on the stage are black Virginia ragamuffins"; "they march well for ragamuffins"; "our mercenaries would do better." At length one of them crowded into the seat by Randolph, and finally, at the end of the performance, as Randolph was leaving, his collar was violently jerked from behind, and there was some jostling on the stairs. The next morning he wrote an angry letter to the President, describing the affair, and concluding: "It is enough for me to state that the independence of the Legislature has been attacked, the majesty of the people, of which you are the principal representative, insulted, and your authority contemned. In their name I demand that a provision commensurate with the evil be made, and which will be calculated to deter others, from future attempt to introduce the reign of terror into our country."

To this wonderful piece of bombast the President made no reply, but he enclosed it in a very brief message to the House of Representatives as relating to a matter of privilege "which, in my opinion, ought to be inquired into in the House itself, if anywhere." A committee of investigation reported a sharp censure on Randolph for "deviating from the forms of decorum customary in official communications to the chief magistrate." He was more cautious for a long time afterward.[1]

Something more than thirty years later Edward Everett of Massachusetts alluded to the episode when favoring a resolution for the arrest of Sam Houston. William Stanberry, a member of Congress from Ohio, said he had been waylaid by Houston on the street, attacked, knocked down by a bludgeon, and severely bruised and wounded. Everett took the ground that the freedom of debate, the dearest privilege of freedom, was involved. Why had Congress left Philadelphia? Was it not because an insult had been offered to a member in a public theater by reason, as it was believed, of the part he had taken in public business? The Legislature of Pennsylvania had promised to protect Congress if it would stay, but the members determined to go where they could protect themselves. If the time should ever come when the House would not assume the injuries inflicted on its members as done to itself, the Constitution would no longer be worth living under.

[1] Henry Adams, *John Randolph*, 40 *et sqq.*

The intimation that the Randolph affair led to the removal of Congress to what is now Washington does not tally with the commonly accepted understanding. Perhaps Everett confused the Randolph matter with the riot of 1783, when deserters from the camp at Lancaster straggled into Philadelphia, demanded their pay, and threatened to seize the persons of the delegates to Congress. Forming in two lines at the door when that body adjourned, they made the members run the gantlet of their menacing insult. So lukewarm were the State authorities and so indifferent the townsfolk that Congress hastily retreated across the Delaware, to Princeton in New Jersey. Very likely the memory of this had some share in influencing the Constitutional Convention of 1787 to provide for complete control over a federal district not exceeding ten miles square, which might be at such a distance from centers of population that Congressmen could deliberate without fear of menace or hurt because of what they might say or do.

One of the early problems of the new Congress was to decide where such a district should be located. At the first session a bill actually passed both branches placing the site at Germantown, but an amendment delayed the bill so that it fell. At the next session the matter was hotly contested. Pennsylvania, by combining with the Eastern States for protective duties, had won their support to her pretensions for the capitol, but the South by a vote of 31 to 28 got the House to decide that the next session should be at Baltimore. This helped bring matters to a head. The dilemma was solved by Alexander Hamilton, who saw in it the chance to get the necessary support for his measure to have the Nation assume the State debts. The trade went through with the help of Jefferson, two Virginia members changing their votes on the matter of assumption, in return for which it was agreed that the capitol should go to the Potomac. One of George Washington's early tasks as President was to locate the exact site. Its isolation is the feature that can be traced in part to the desire for freedom of debate.

The Houston case was made the more interesting to us by the personality of the man accused. Houston had been a member of Congress and Governor of Tennessee. He was to be the first President of the Texan Republic, later a United States Senator, and then Governor of Texas — one of the striking characters of our pioneer history. When he had been brought before the bar

of the House, his trial and the debates connected with it went into the subject thoroughly, the whole affair taking nearly four weeks. Houston was found guilty. His punishment was a reprimand by the Speaker "for the contempt and violation of the privileges of the House." [1] It was administered, however, in such a manner as to leave the House in no doubt that the Speaker sympathized with the assailant rather than the assailed — with General Houston rather than with the insulted House over which he presided.[2]

In 1835 John Ewing of Indiana, a member of the House, averred that he was waylaid and assaulted in a most brutal, outrageous, and dastardly manner by Lieutenant John F. Lane, for no other known cause than for words spoken in debate some weeks before in reply to Lane's father, also a member. Young Lane told the committee taking evidence in the case that he did not feel bound to disclose his private motives for the assault, and as it appeared doubtful whether words spoken in debate were the real cause, no action was taken.

In 1913 the House carried its authority to the point of punishing for an assault committed upon a member in the course of the sitting Congress on account of a speech delivered in the preceding Congress. Charles C. Glover, a citizen of Washington, had assaulted Thetus W. Sims. In the course of the five-hour debate, John W. Davis held that as the wrong was done to the House, the fact that the cause was of earlier date made no difference. On the other side Philip P. Campbell argued that Congress does not possess inherent or constitutional power to convert itself into a judicial body with the right to try guilt or innocence upon a question of fact. He thought the procedure to be denial of the right of trial by jury. The House voted by 200 to 4 that Glover should be brought before the bar. Upon his appearance there he apologized and was formally reprimanded.

The English courts draw a sharp line between speech within the House and its publication without. In 1798 it was held by the Court of King's Bench in the case of Rex *v.* Abingdon (1 Espinasse, 226) that a member of Parliament might have a right to publish his speech, but that the speech must not be made the vehicle of slander against any individual; if this was done an action of libel would lie for its publication. A similar judgment was

[1] *Hinds's Precedents*, II, secs. 1616–19.
[2] Parton, *Life of Andrew Jackson*, III, 391.

pronounced in 1813, in the case of a well-known member of Parliament, Mr. Creevey. On this occasion the House absolutely refused to interfere or to treat the matter as a question of privilege. Stockdale *v.* Hansard (2 Vict., 1839, 9 Ad. & Ell. 1) decided that the House of Commons could not, by ordering a report to be printed, legalize libelous matter. By statute 3 and 4 Vict., c. 9, all reports, papers, votes, and proceedings ordered to be published by either House of Parliament were made absolutely privileged, and all proceedings at law, civil or criminal, will be stayed at once on the production of a certificate that they were published by law of either House. By section 3, however, of the same Act, if an extract from or abstract of any such Parliamentary paper be published not by the authority of Parliament, such publication has only a qualified privilege, and the plaintiff can recover on proof of actual malice.

It is now sound doctrine that a publication by a member of the House of Commons of a report of his speech, *bona fide* addressed to his constituents, would be privileged. The privilege in such a case would arise because the publication is as a communication between a member and his constituents, and not because it is a true report of what took place in Parliament. Also it is now laid down that the reprinting of a speech which reflects upon the character of any person, without adding the rest of the debate, is not "fair," and is therefore unprotected: no doubt it would be otherwise if the whole debate were given.

In this country the general opinion is that the immunity of lawmakers for what they say in debate extends to publication. To be sure, when B. B. Mussey & Co. published a speech by Horace Mann, denouncing B. R. Curtis, U.S. Commissioner in Boston, for sending Thomas Sims back to slavery, they were held responsible for libel, but that was in part because, although the speech was on a matter of public interest, it charged Curtis with corrupt and improper motives.[1] As a rule it would probably be held that a speech delivered and published in good faith is addressed not only to the House, but also to the constituents of the speaker, and therefore may be safely published. Where publication is directed by law, as in the case of the debates in Congress, there is no doubt of privilege.

Whether words spoken not in debate, but in connection with the business of the House, are privileged, is a delicate question

[1] Curtis *v.* Mussey, *et al.*, 6 Gray, 261, 273 (1856)

that reached the highest court of Massachusetts as the result of an episode of June, 1805. It seems that William Coffin asked Benjamin Russell, a member of the Legislature, to move a resolution authorizing the appointment of an additional notary public for Nantucket. Russell made the motion, and then had leave to lay the resolution on the table. After the House had proceeded to other business, Micajah Coffin, also a member, approached Russell as he was standing in the passageway, within the room, conversing, and addressed to Russell defamatory words about William Coffin. Did privilege protect Micajah? Judge Parsons, the other Justices concurring, held it did not. The defendant had maintained that he spoke the words within the presence of the House, then actually sitting, and in his capacity as a member, in connection with a motion not finally acted upon. The court found it impossible to presume that the defendant, in using thus publicly the defamatory words, even contemplated that he was in the discharge of any official duty. Meantime, the House itself had resolved "that words spoken by any member, within the walls of this House, relative to a subject under their consideration, either in their separate capacity, or in a convention of both branches of the Legislature (whether the member speaking such words addresses himself, in debate, to the chair, or deliberates and advises with another member, respecting such subject), are alone and exclusively cognizable by this House." The court agreed to this, but held that in this case the words were not spoken on a subject before the House, either in an address to the chair, or by way of deliberation or advice with another member. The court said it would have gone farther than the resolution, allowing privilege if the words had been officially spoken, whether within or without the walls of the chamber.[1]

[1] Coffin *v.* Coffin, 4 Mass. 1.

CHAPTER XIV

PUBLICITY AND REPORTING

If the extreme view were to prevail, that a representative is a trustee to whom for the time being power is absolutely delegated and that the only control over him lies in taking from him this power, then nothing but the results of his work — that is, the completed laws, if lawmaking were his only task — would concern the public. There would be no reason for interfering with that secrecy of deliberation which has such evident advantages. It is not to be gainsaid that conference is conducted behind closed doors with more frankness, sincerity, and singleness of purpose than before an audience. Admit the public and at once vanity, the desire for applause, fear of criticism, and other disturbing motives begin to hamper free discussion and to cloud decision. There is, however, no proof that these considerations were deliberately recognized by early lawmaking bodies in shaping their processes. Beginning as councils, they naturally followed the tendencies of councils. With no continuous accountability to their principals, but only such as might be demanded after their return home, the agents of localities had no motive for exposing to the public view the details of their conferences while in progress. Furthermore, there would have been danger in such exposure by reason of their relations with the King. If he knew what they were thinking about and talking about, he would have grounds for coercing individual members of Parliament, perhaps for punishing them. In time it became of the utmost importance to prevent him from learning what was said.

In the reign of Henry VII a member of the House of Commons was committed to the Tower for acquainting the King with the debates in Parliament, and both he *and his posterity* were by an Act disabled from ever sitting or serving as representatives for any place whatever. In the reign of Queen Elizabeth there was a similar case, when Arthur Hall, Esq., was committed to the Tower for six months, fined five hundred pounds, and expelled the House, for having published the debates. The reason for the severity of this may be understood when it is known that in numerous instances after the dissolution of a Parliament, members

received severe punishment for things they had said in the House to the offense of the Crown.

The effect was to make it a principle of parliamentary law that sessions of Parliament should be held behind closed doors and the seal of secrecy should be set on its deliberations. As the years passed and the King gradually lost his power, it became less important to enforce this rule continuously and the presence of visitors was overlooked when no harm seemed likely. It was established, however, that any one member would be warranted in demanding that the rule be enforced. The right was freely exercised, and without debate, simply on demand, for if a motion to clear the House were required and that motion were debatable, the purpose of the rule might be thwarted, as in debate the matter to be kept secret might be divulged. The standing order came to be that the Sergeant should take into custody all strangers he might see in the House, or that might be pointed out to him.

It has been suggested that the strange venality of Parliament under William of Orange and for many years afterward may have been due to the fact that the secrecy with which debates were shrouded prevented the exercise of any wholesome public opinion upon the vote of the members, while the Crown had lost that opportunity of coercion which it enjoyed under the Tudors. It became necessary to buy what could not be procured by violence, while there was no pressure from without to restrain the cupidity of unprincipled members.

As the power of the King waned, the power of the people waxed, and presently members found it useful to protect the House from what they deemed to be popular intimidation. Strangers might attend for the purpose of noting the words of a member that he might be excoriated in the press or punished at the polls. It was in the time of Wilkes that this danger from publicity came to be obnoxious to those who insisted on parliamentary independence. Opinion was divided. Fox, about 1778, said he was convinced the true and only method of preventing misrepresentation was by throwing open the gallery, and making the debates and decisions of the House as public as possible. Since his day that view has gained general acceptance. To be sure, the Speaker or any single member still has the right to propose the exclusion of persons not entitled to be present, but since 1875 it has not been enough by itself for him to say he "espies strangers." H. W. Lucy pleasantly tells how then it came to

pass that the ancient rule was modified. One evening Mr. Chaplin secured first place for a motion relating to the breed of horses. The Prince of Wales, accompanied by a numerous suite of peers whose faces were familiar at Newmarket and Epsom, came down to hear the speech and the debate. It was a great opportunity for Mr. Chaplin, and he was evidently prepared to rise to the occasion. Unfortunately for him, he had chanced some days earlier to offend Mr. Biggar. Joey B. — the member for Cavan — like the redoubtable Joe Bagstock was sly, devilish sly. If Mr. Chaplin saw his opportunity, Joseph not only descried his, but seized it first. Mr. Chaplin had risen, fixed his eyeglass, smitten himself reassuringly on his portly chest, had coughed in prelude to his opening sentence, when from below the gangway opposite, a well-known shrill voice was heard exclaiming: "Mr. Speaker, sir, I believe there are strangers in the House."

"For a moment the crowded chamber was hushed in dismayed silence. The Speaker broke it by enquiring whether the honorable member for Cavan persisted in his intention of noticing strangers. 'If you please, Mr. Speaker,' said Mr. Biggar with encouraging nod toward the chair. Then the anger of the House found issue in a roar of contumely, through which was heard the unparliamentary, almost unprecedented, sound of hissing. The Speaker had no option. He must needs order strangers to withdraw. Thereupon the Prince of Wales, the German Ambassador, who chanced to be in the diplomatic gallery, and the crowd of peers, boasting the bluest blood in England, were compelled to scuttle. Mr. Biggar had his fun, but the House of Commons reaped permanent benefit from the prank. He brought into broad daylight the absurdity of the ancient custom, which was thenceforth doomed." [1]

The present regulation is that upon the request of a member for the removal of strangers a division is to be taken at once without debate, and the result of the division is to determine what shall be done.

The ladies' gallery is not supposed to be within the chamber, so that an order of exclusion does not reach its occupants. In the autumn of 1908, however, the disorderly conduct of persons in the ladies' and strangers' galleries caused the Speaker to close these galleries during the rest of the session.

In Germany before the World War the sittings of the upper

[1] "The Queen's Parliaments," *No. Am. Review*, June, 1897.

branch, the Bundesrath, took place behind closed doors; those of the Reichstag were, by constitutional provision, public. Under the standing orders, however, the body might go into secret session, on motion of the president, or of ten members. The Constitution adopted for the Commonwealth July 31, 1919, stipulated that the proceedings of each House should be public, but permitted the upper branch to make rules excluding outsiders during the discussion of particular subjects, and said that upon a two-thirds vote following a request of fifty members of the lower branch, the public ought to be excluded.

Secrecy was one of the instruments at the command of Louis Napoleon for consolidating his power in the early years of his reign. Although it was provided that sittings of the Chamber should be public, the doors could be closed on the demand of any five members, and of course the Government could easily command the support of such a handful.

It is probable that all the colonial Legislatures of America were accustomed to sit with closed doors. Among the rules adopted for the Pennsylvania Assembly in 1703 was one, "That no Member presume to divulge the Debates or Secrets of the House." When Governor Shirley of Massachusetts Bay decided to surprise Louisburg, in the beginning of January, 1745, he requested the members of the General Court to lay themselves under an oath of secrecy in the matter of receiving from him a proposal of very great importance. "This was the first request of the kind which had ever been made to a legislative body in the Colonies," says Jeremy Belknap. "They readily took the oath, and he communicated to them the plan which he had formed of attacking Louisburg. The secret was kept for some days, till an honest member, who performed the family devotion at his lodgings, inadvertently discovered it by praying for a blessing upon the attempt." [1] No harm appears to have resulted. Louisburg was surprised.

What appears to have been the first modern instance of formally authorized publicity for the deliberations of a legislative body was the opening of the Massachusetts General Court to the public upon the motion of James Otis, June 3, 1766. This was due to the great interest in the debates on the question of the repeal of the Stamp Act and on that of compensation to the sufferers by the riots in Boston. Otis moved and it was voted that a

[1] *History of New Hampshire*, II, 155.

gallery be opened "for such as wished to hear the debates." A writer in the "New Hampshire Gazette," cited in the "Boston Gazette," December 15, 1766, expressed his satisfaction at the opportunity he had of hearing the debates in the Massachusetts Assembly, and hoped that the people of his colony "would soon have the same happy privilege of galleries." The New Jersey Assembly unanimously resolved, in October, 1769, that the sessions should be public. The new idea, however, made slow progress. The proceedings of the Provincial Congress were secret and not until after the Federal Union was formed did publicity establish itself.

Almost from the start, members of the Federal Senate sought the admission of the public. In 1790 motions to that effect were twice defeated. In February of 1791 the Senators from Virginia moved a resolution that the doors of the Senate should be opened on the first day of the next session. The "Journal" of William Maclay, Senator from Pennsylvania, who rivals Jefferson for the honor of being the pioneer Democrat (or Republican as it was then termed), tells us in his "Journal" how he viewed the matter and put it to the Senate: "I knew of no reason for keeping the door of any legislative assembly open that did not apply with equal force to us. The objections against it, viz., that the members would make speeches for the gallery and for the public papers, would be the fault of the members. If they waged war in words and oral combats: if they pitted themselves like cocks, or played the gladiator, for the amusement of the idle and curious, the fault was theirs; that, let who would fill the chairs of the Senate, I hoped discretion would mark their deportment; that they would rise to impart knowledge and listen to obtain information; that, while this line of conduct marked their debates, it was totally immaterial whether thousands attended, or there was not a single spectator." [1]

In spite of this laudable advice two more motions to admit the public were speedily defeated. After the contested election case of Albert Gallatin came up, in December, 1794, the contest for open sessions was renewed, and February 11, 1794, it was voted to open the doors during the discussion on this case. The long controversy over the matter was ended February 20, when by a vote of nineteen to eight this resolution was adopted: "*Resolved*, That after the end of the present session of Congress, and

[1] *Journal of William Maclay*, February 24, 1791.

so soon as galleries shall be provided for the Senate chamber, the said galleries shall be permitted to be opened every morning, so long as the Senate shall be engaged in their legislative capacity, unless in such cases as may, in the opinion of the Senate, require secrecy, after which the said galleries shall be closed."

On the same day it was unanimously resolved: "That on motion made and seconded to shut the doors of the Senate, on the discussion of any business which may, in the opinion of a member, require secrecy, the President shall direct the gallery to be cleared; and that during the discussion of such motion the doors shall remain shut."

Since then it has been the almost uniform practice of the Senate to consider within closed doors nominations, as well as confidential communications from the President and the heads of the executive departments. Hence comes the term, "executive sessions," now so commonly used in all American lawmaking bodies to designate all secret sessions that the purist grieves in vain over the inaccurate expansion of its significance. Much criticism has been heaped on the secret sessions of the Senate, but to no purpose; for most men of any experience in statecraft realize the utility and wisdom of secrecy in the discussion of business of a confidential nature. Agreement is not so general as to its desirability in the matter of confirming nominations and of topics not essentially confidential. Numerous efforts have been made to get publicity when such things are under consideration. In 1841 Allen of Ohio persistently but fruitlessly tried to end the custom. In 1853 Chase of Ohio renewed the attempt without avail, and other attempts since have had no better fortune. However, under amendments to the rules in 1888, it has been clearly set out that executive business may, at the will of the Senate, be considered with open doors, and since the World War the open discussion of treaties has proved so useful and salutary that there is no likelihood of return to the old practice of excluding the public when they are under debate.

It was a long time before the Senate came to look cheerfully on the presence of strangers at any of its deliberations. When the capitol at Washington was first occupied, no seats were prepared for the accommodation of the public; and it was not until many years afterward that the semicircular gallery was erected for their convenience. In the old chamber about one third of the

space was allotted to the public; in the new chamber the galleries cover two thirds of the area.

No such exclusiveness has been the history of the National House of Representatives. However, at the outset, in accordance with British precedent, ladies were not admitted to the galleries. One night at a party a lady expressed her regret to Fisher Ames of Massachusetts that she could not hear the arguments, especially his speeches. Mr. Ames gallantly replied that he knew of no reason why ladies should not hear the debates. "Then," said Mrs. Langdon, "if you will let me know when next you intend to speak, I will make up a party of ladies and we will go and hear you." The notice was given, the ladies went, and since then congressional orators have always had them for hearers.[1] John Randolph, in the course of one of the House debates of 1820 on the Missouri question, seeing the floor and gallery crowded by these fair listeners, rose, and, pointing his long index finger, said in his peculiarly shrill voice: "Mr. Speaker, what pray are all these women doing here, so out of place in this arena? Sir, they had much better be at home attending to their knitting." This harsh reproof appears to have thinned the audience for a few days.

The Constitutions of three quarters of the States provide that the proceedings of the legislative Houses shall be public, but all save three or four except occasions when in the judgment of the House secrecy may be desirable. This is usually to be determined by majority vote, but Ohio in 1851 made it a two-thirds vote. On the face of it the exception might be thought to nullify the rule, but as a matter of fact the policy of open doors has now become so thoroughly established that the question rarely rises.

Cushing, writing in 1856, held it to be the common parliamentary law that legislative assemblies are closed against the public. Hence he argued that where Constitutions are silent on the subject, "unless the theoretical character of legislative bodies should be considered as changed by long usage and the nature of our government and institutions, it would seem, that it could not be competent for a legislative assembly by any connivance, remissness, or voluntary act of its own, to change the basis of its original constitution. In these bodies, therefore, whatever rule or usage there may be to the contrary, their theoretical character is to sit with closed doors; and it is in the power of any mem-

[1] Ben: Perley Poore, *Reminiscences*, I, 77.

ber, upon his mere demand, and without any previous order therefor, to make the practice correspond to the theory, or, in other words, to exclude strangers therefrom at his pleasure."[1]

By this time, however, it may be doubted if what Cushing thought the common parliamentary law has not been abrogated, in this country at any rate, by universal practice to the contrary. Any legislator who "noticed" the presence of strangers and called for the House to be cleared would be looked upon with amazement by his fellow-members, most of whom never so much as heard of the procedure.

Publication of Debates

Suetonius says of Julius Cæsar upon his election to the consulship: "Having entered upon his office, he introduced a new regulation, that the daily acts both of the Senate and people should be committed to writing and published." The proceedings were reported in short notes taken by one of their own order, "strangers" not being admitted to their sittings. These notes included speeches as well as acts. The practice of publishing the proceedings of the Senate was discontinued by Augustus. Cæsar, who was no mean orator, suffered at the hands of the note-takers. Suetonius speaks of "blundering short-hand writers who were not able to keep pace with him in the delivery."

Parliament sat for centuries before the people of England were able to read what was said behind its doors. So strong was the feeling against allowing public opinion to get material on which to feed that in 1641 Sir Edward Dering was expelled from the House and imprisoned in the Tower for publishing without leave a collection of his own speeches, and the book was ordered to be burned by the common hangman. A growing spirit of curiosity, as well as of serious interest in public affairs, led to the printing of reports, necessarily inaccurate. To meet this, the Commons in 1680 directed its "votes and proceedings" to be printed under the direction of the Speaker, but there was to be no reference to the debates.

In the next century the development of the newspaper forced the issue. Men ahead of their time began to ask why the public should not be informed, accurately informed. In 1738 Sir William Wyndham urged in the House of Commons that the only objectionable feature of the reports in circulation was their inac-

[1] *Law and Practice of Legislative Assemblies*, 138, 139.

curacy. "No gentleman ought to be ashamed," he maintained, "that the world know every word he speaks in the House. The public might have a right to know something more of the proceedings of the House than appears from the votes." He found no support. The House resolved once more "that it is a high indignity to, and a notorious breach of, the privileges of this House to publish the debates, and this quite as much during the recess as during the sitting of Parliament."

Nevertheless, whether the House approved or not, in spite of threats and punishments, publication of speeches continued. Sometimes they were credited to orators of ancient Rome. Sometimes initials betrayed without declaring the authorship. Presently the printers became bolder and threw disguises aside, which only made matters worse, for now the responsibility for garbled speeches was saddled explicitly on men who had no protection from the carelessness, stupidity, or malice of the journalists. Reported at second hand, ingenious and embellished elaborations of what little could be remembered by somebody who had been present, these accounts did little good and much harm. The ponderous Dr. Johnson was for a time guilty of a share in this kind of deception. Many of Lord Chatham's earlier speeches in the House of Commons as now preserved were really the work of Johnson, whose heavy style marks every sentence. Each debater reported by Johnson spoke in exactly the same manner. After a time he woke to what he was doing. Boswell records him as saying that as soon as he found the speeches were thought genuine, he determined he would write no more of them, "for he would not be accessory to the propagation of falsehood." And such was the tenderness of his conscience that, a short time before his death, he expressed his regret for having been the author of fictions that had passed for realities.

To John Wilkes, a demagogue and a worthless profligate, England owes in great part that freedom of the press to report and to criticize, on which the power of the people over their representatives to-day chiefly depends. In the matter of reporting debates his chance came when as a result of his war with Parliament he had been elected an Alderman and was sitting as a magistrate. The Commons, indignant because their speeches were reported while the Lords were able to secure secrecy, determined to punish some of the printers, among them one Miller, who refused to come when summoned to be reprimanded. A messenger sent to

fetch him was arrested, and the Lord Mayor, with Aldermen Oliver and Wilkes, sustained the arrest. The Mayor and Oliver were members of the House, which promptly sent them to the Tower. Mobs gathered. The City of London took up the cause of its Mayor and Oliver. So threatening was the situation that the House let the matter drop. When prorogation came the prisoners were allowed to leave in triumphal procession. The matter was not brought up again and the liberty of reporting was established.

The results of this memorable contest can hardly be overestimated. It made of the newspaper the chief instrument for bringing to bear on English lawmakers the force of public opinion. An extremist would say that it created government by the press. At any rate, from that time no member of Parliament was beyond the reach of the critic. Henceforward no member could voice his opinions on the floor of the House without the certainty that they would become known to his constituents and that he would be held responsible for what he might say. At the same time there sprang into action that reflex influence which came from the effect on public opinion of the debates in the House. Members now began to speak, not alone to persuade each other, but also to persuade the country. Thus by action and reaction began the growth of that relation between the representative and the people which now has reached the point of making England in some ways the most democratic country in the world.

The change could not be complete so long as the House of Commons remained unreformed. Such of its members as came from rotten boroughs or for other causes were not in fact dependent on the approval of a popular constituency, were beyond the reach of the press. Lord John Russell described their situation in a speech on parliamentary reform in 1819. "Such members," he said, "are unlimited kings, — bound by no rule in the exercise of their power, — fearing nothing from public censure, in the pursuit of selfish objects, — not even influenced by the love of praise and historical fame, which affects the most despotic sovereigns; but making laws, voting money, imposing taxes, sanctioning wars, with all the plenitude of power, and all the protection of obscurity; having nothing to deter them but the reproach of conscience, and everything to tempt the indulgence of avarice and ambition." [1]

[1] *Hansard's Debates*, 3d Ser., XLI, 1097.

The Reform Act of 1832 put an end to this immunity. There remains no member whom public opinion, as voiced by the press, cannot reach.

Reporting of the debates was long a matter of private enterprise. The system of having the Government contribute toward the expense became more and more unsatisfactory, until in 1905 it was decided to make the publication official. Up to that time the only speeches sure to be reported in full and in the first person were those of the Front Bench, Ministers, and former Ministers. The speeches of other members were usually abridged and given in the third person. At least a third of each speech was thus printed, and as much more as in the judgment of the contractors was worth while. Of course such exercise of judgment produced ill-feeling. Doubtless as usual the man who thought his remarks most worthy of preservation suffered the most curtailment. With 1909 the ground for complaint was removed.

Times had changed. The old method had sufficed as long as the newspapers printed full reports of debates, but the fashion of "sketch" reports had come into vogue, and this was not fair to the members. If the judgment of the press in its choice of news may be accepted as unerring, Englishmen had significantly altered their attitude toward the doings of Parliament. Through the greater part of the nineteenth century the debates had surpassed everything else in public interest. Sir J. R. Seeley, lecturing in 1891, had ascribed this to the sporting instinct. "Why do we read the debates? Simply to see whether the Government is likely to stay in or go out. We follow the session with precisely the same interest with which we follow a boat-race, and the successive division lists show us whether the Opposition is or is not gaining upon the Government." [1] Lowell thought the predominance of the House of Commons as the great forum for the discussion of public questions had been undermined by the rise and growth of the platform.[2] Parliament was no longer the only place where the party leaders made notable speeches. Lord Robert Cecil, giving his views to the Select Committee on Procedure in 1914, traced the change to the loss of prestige by the House.

In the course of the World War the Commons found it expedient to provide for secret sittings. An Order in Council April 22, 1916, forbade the publication of reports of such sittings other

[1] *Introduction to Political Science*, 223.
[2] *The Government of England*, I, 427.

than those officially communicated, and even any reference to them was made unlawful, but it was not necessary to proceed under this regulation. The sittings of April 25 and 26 were secret, the immediate object being understood to be to get acceptance of a measure for compulsory military service. On the whole the general opinion seemed to be that the experiment was not successful enough to encourage repetition. Nothing that may have leaked out found its way into print.

Louis Napoleon stifled public discussion of legislative proceedings in the early years of the Second Empire. Driven to concession in 1860, on the 24th of November he issued a decree proclaiming sundry reforms, and among them permission for the publication of the debates in the daily papers. Later he relaxed still more his control of the press, but it was still forbidden to discuss the Constitution or the debates in the Chamber.

The German Constitution of 1919 declares that true and accurate reports of the proceedings in public sittings of the National Assembly, of a State Assembly, or of their committees, are absolutely privileged.

American Experience

In the seventeenth century men in authority on this side the water were even more hostile to publicity than those on the other. Their temper is shown by the well-known report of Governor Sir William Berkeley of Virginia. He was one of the best of Governors. He was largely responsible for the free institutions of Virginia. Yet in answering a series of queries sent out by the Commissioners of Plantations, he said, in 1671: "I thank God, *there are no free schools nor printing*, and I hope we shall not have these hundred years; for *learning* has brought disobedience, and heresy, and sects into the world, and *printing* has divulged them. God keep us from both." Berkeley has been often held up to reprobation for this, by men whose ancestors in other colonies were no whit less intolerant, if not quite so frank. Read the record of a Massachusetts Court, October 3, 1662: "For prevention of irregularities & abuse to the authority of this country by the printing presse, it is ordered, that henceforth no copie shall be printed but by the allowance first had & obteined under the hands of Captain Daniel Gookin & Mr. Jonathan Mitchel, until this Court shall take further order therein." [1]

[1] *Records of the Colony of the Mass. Bay in N.E.*, IV, pt. 2, p. 62.

This order, to be sure, was repealed in the following year,[1] but was revived May 27, 1665, though modified so that a printing press should be allowed in no town but Cambridge. This time four censors were provided, the President of the college being one, they or any two to survey printed copies and prohibit or allow.[2]

The Fundamental Constitutions of Carolina, framed in 1669 by so liberal a thinker as John Locke, author of the "Essay on the Human Understanding," and amended by the Earl of Shaftsbury (Anthony Ashley Cooper), contained this section: "Eighty. Since multiplicity of comments, as well as of laws, have great inconveniences, and serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the common or statute laws of Carolina, are absolutely prohibited." This, however, did not reach the extreme found in Virginia when Lord Culpeper, the Governor, matched Berkeley in his horror of printing. The record says: "February 21st, 1682. John Buckner, called before the Lord Culpepper and his councel, for printing the laws of 1680 without his excellency's license, and he and the printer ordered to enter into bond in £100 not to print anything thereafter until his majesty's pleasure should be known." That pleasure, as signified in the royal instructions of the next year, positively forbade the allowance of any printing press in the colony.

In Carolina they were not to discuss the law. In Virginia they were not to know what it was.

In Massachusetts they were not to know how it was made. An entry in the Journal of the lower House, June 11, 1644, reads: "It is ordered, that Mr. Speaker, Captain Cooke, & Mr. Dummer are chosen a committee to consider of & to draw upp an order to prevent the members of this howse from discloseinge any of ye private businesses thereof abroade." [3]

The newspapers of colonial times at first got into trouble by their treatment of public affairs, but with the Revolutionary epoch came a wiser conception of the relation between the people and their servants, making it natural and common for the press both to report and to criticize public transactions. To be sure, the Federal Convention sat behind closed doors, and the public did not learn of its debates for many years, but that was an ex-

[1] *Records of the Colony of the Mass. Bay in N.E.*, IV, pt. 2, p. 73.
[2] *Ibid.*, 141.
[3] *Ibid.*, III, 7.

ceptional crisis. There was ground for the fear that publication from day to day would hamper the members and embroil the public. A complete Constitution was their task, and until it could be submitted, little was to be gained and much might be lost by fragmentary criticism.

The first Congress began with having the debates of the House reported by short-hand writers and printed in the "Congressional Register," an unofficial publication, and in the newspapers. The reporters were allowed access to the floor of the House, and generally had seats in front of the Speaker's platform. The Representatives frequently complained that the reports published were "glaring deviations from the truth" and full of "great misconceptions," often "distorting the arguments from the true meaning," and "imputing to some gentlemen arguments contradictory and foreign to the subject, and which were never advanced." At last a motion was made to prohibit the publication of reports. This was discussed with considerable earnestness, and then was withdrawn "with the hope that the reporters and printers would be more cautious in the future as to their publications, and study a greater degree of accuracy and impartiality." [1]

It took the Senate longer to accept and then court publicity. That body for several years sat in secret session and, apart from its meager executive and legislative Journals, had the policy of placing as little of its proceedings as possible in printed and accessible form. Later, when public opinion constrained a change in policy, it was years before it showed a marked inclination to print freely its reports or documents.[2] Up to 1802 men who went to the Senate to take notes found it impossible to report debates. Their place was with the public in the upper gallery, so far removed from the floor of the chamber that they could not hear what the Senators said. Then the editor of the "National Intelligencer" was assigned a place on the floor, where he could both hear and see all that was said and done. He was a Republican; the Federalists, therefore, when the Yeas and Nays were taken, disgraced themselves by attempting to keep him out.[3]

In the same year the House adopted a rule for the admission

[1] J. W. Moore, *The American Congress*, 127.

[2] Gen. A. W. Greely, "Public Documents of Early Congresses," Am. Hist. Assn., *Annual Report* for 1896, I, 114.

[3] McMaster, *Hist. of the People of the U.S.*, II, 607.

of stenographers. Previously they had been admitted at the will of the Speaker, and in the debate over the rule it was charged that the Speaker had used this power arbitrarily, sometimes going to the extent of suppressing the publication of speeches. Suspicion of favoritism cropped up again in 1813 when Speaker Henry Clay was charged with excluding a stenographer for partisan reasons, but Clay's explanation satisfied the majority.

Stenography had not then been brought to the point where adequate reports could be expected. When Daniel Webster pronounced that greatest of his orations, the reply to Hayne, although it was after long and profound study of the subject, yet it was without opportunity for immediate preparation, and he was forced to speak from a brief that covered hardly more than a modern sheet of note-paper. Mr. Seaton — with this brief, with imperfect and detached notes, taken by a method of his own which would now be discarded as useless, with the help of his wife who had listened to the speech and could recall its most striking passages, and with the aid of Webster's own recollections — undertook the work of writing out this unsurpassed effort. Friends who were listeners were called in, and paragraph after paragraph was submitted to the test of their memory, and altered or rewritten as doubts were thrown on the accuracy of the original draft. They were called in also to aid in the choice of phrases and sentences the most impressive, regardless of the original notes. It was not until a month after delivery that this work of reproduction was completed and the speech published first, even in a Washington newspaper,[1] as it now appears.

The publication of verbatim reports of the proceedings of Congress was systematically begun about the middle of the century. Ben: Perley Poore, whose long acquaintance with public life in Washington ought to have made him a competent critic, thinks this unquestionably had a disastrous effect upon the eloquence of Congress, which no longer hung upon the accents of its leading members, and rarely read what appeared in the report of its debates. "Imitating Demosthenes and Cicero, Chatham and Burke, Mirabeau and Lamartine," he says, "the Congressmen of the first fifty years of the Republic poured forth their breathing thoughts and burning words in polished and eloquent language, and were listened to by their colleagues and by spectators so alive to the beauties of eloquence that they were

[1] Henry L. Dawes, "Has Oratory Declined?" *Forum*, October, 1894.

entitled to the appellation of assemblages of trained critics. The publication of verbatim reports of the debates put an end to this, for Senators and Representatives addressed their respective constituents through the Congressional Globe." [1]

It may well have been that the change had some effect of this sort, but since much the same sort of change has taken place in Parliament, perhaps altered conceptions of the purpose and method of addressing legislative bodies may have had something to do with it. No lawmaking assembly of English-speaking men would to-day endure the sort of oratory that was effective a hundred years ago. There can be little doubt, however, that verbatim reporting incites prolixity and interferes with the speedy transaction of business. "It is a singular fact in the history of all legislative assemblies," General Butler observed, "that not much is actually done where the proceedings are officially reported. In the United States Senate there is more done in the few days of secret or executive session, where no speeches are reported, than is done during the whole session, in open Senate where the proceedings and speeches are published day by day, with very little profit to anybody." [2] Here, too, may be exaggeration, but it has a kernel of accuracy.

In view of these considerations there was ground for surprise when one of the wisest public men of our day, Elihu Root, urged on the New York State Convention of 1915 that it should recommend a constitutional provision requiring the Assembly to keep a record of its debates. No doubt it was the weight of his commanding influence that led the Convention to accept his view. The provision, however, went by the board with all the rest of the recommended changes.

Mr. Root's experience and sagacity call for attention to his argument. "This measure," he said, "is designed to make the reasons for action on the part of the Legislature matters of public record. It is designed to enable the people of the State to know why the Legislature passes bills and why it refuses to pass bills. It is designed to restore the art of debate to the Legislature. It is designed to make the Legislature of the State an avenue of preferment, so that able and ambitious young men of the State may seek places in the Senate and Assembly in order that they may demonstrate their capacity and become known to the people of the State. As it is now, no one knows what the Legislature

[1] *Reminiscences*, I. 301. [2] *Gen. B. F. Butler's Book*, 118.

is doing or why it is done except as the quite limited news articles in the public press are spread through the State. I see no reason why this great State of eleven millions of people should permit its Legislature to do its business in such a way that there is no means of knowing the reasons for its action."

"We ought to dignify the Legislature of this State," Mr. Root further said. "We ought to seek to make it respected and honored. We ought to treat it as being worthy of attention by the people of the State. We ought to proceed on the theory that the arguments that are made here, for and against measures of public interest, are worth being known to the people of the State. This amendment will tend in that direction. It is something we cannot expect the Legislature itself to do."

The Convention adopted Mr. Root's amendment without opposition. Yet something could have been said on the other side. Starting with the premise that the newspapers live by printing what readers want to read, it might have been pointed out that newspapers no longer print anything but the most fragmentary reports of the proceedings of our lawmaking bodies, State and Federal. If any considerable number of readers now wanted more, it is sure that their demand would be met by the press. Therefore it is safe to predict that no considerable number of the people would inform themselves about legislative doings if verbatim reports were accessible. Almost nobody reads the "Congressional Record" thoroughly. Few even turn its pages. As a record, it has the value of all records to the student and historian. But its influence on current opinion is small. Verbatim reports of debate in State Legislatures would be no more effective in that particular. They would not be read at the time of publication or soon after save by hostile candidates for office, hunting for sentences which, detached from the context, might serve to hold a rival up to ridicule or scorn.

Governor Emmet O'Neal of Alabama has approached the question from the point of view of one who evidently thinks something is to be gained by holding individual members to account for the acts of a whole Legislature. "The legislative Journals furnish very meager information," he says, "and it is very difficult by their examination to ascertain the responsibility of each member for the laws that are enacted. The publication, therefore, of a stenographic report of the debates would keep the public fully informed as to the record of each member, and fur-

nish a simple method by which responsibility for each law could be readily ascertained. Publicity is the most efficient remedy for many of the evils of legislative assemblies. Such a publication would tend to make the individual legislator more careful in the discharge of his important duties." [1]

If we accept the theory of individual responsibility for legislation, there is weight in this, but its importance dwindles when you remember that many bills held obnoxious by some persons are never debated at all on the floor, and that in the case of others the members most responsible may not share in the public debate. Committee discussion would also have to be reported if real responsibility were sought.

There is one value to verbatim reports upon which Mr. Root and Governor O'Neal did not touch. As years pass and the reasons that led to this or that law go out of mind, it sometimes becomes of great importance to recall them. To illustrate: The Massachusetts Primary Election Law of 1903 probably could not have been enacted had it not promised to remedy the evil of caucus packing, that art by which the nominations of one party are modified by the votes of members of another. The evil had become flagrant and the law in question brought it to an end. A decade and a year passed, the public forgot, a new crop of lawmakers forgot or did not know, and the Legislature gave the people the chance to vote on substituting what is known as the "open primary," where the voters of any party may if they please join in selecting the candidates of some other party. The people voted the change. They tried it just one year. Precisely the same old evils revived. Then the people voted to go back to the system they had discarded. Perhaps this waste of effort and whatever harm accompanied it could not have been avoided, but there would have been more chance if the debates of 1903 had been accessible.

Where, as in a State like Massachusetts, important problems are often debated through a series of years before action is achieved, a record of debates would put at the command of each Legislature in turn the informatory material previously gathered and used by debaters.

For these reasons, in addition to some of those urged by Mr. Root, any Legislature might well afford to follow the example of the New York Assembly, which provided by its rules for an

[1] " Distrust of State Legislatures," *No. Am. Review*, May, 1914.

official stenographer, whose notes are to be filed with the Clerk and form part of the archives of the House. A member can get a transcript of his remarks or any of the debate by paying ten cents a folio, which the stenographer gets in addition to his fixed compensation.

For most of the practical purposes it will be found quite sufficient to have a typewritten transcription filed in the State Library, without going to the expense of printing and publishing. If at the time or afterward it should seem desirable to have certain speeches or debates put in print, it would not be impossible to provide for this by separate documents, under some system not open to serious abuse. A few hundreds, or even a few thousands of dollars spent in this way each year would be amply repaid in the course of time by facilitating or bettering legislation, and in case of real need by enlightening the public.

Other and more important considerations affect the reporting of debates in Constitutional Conventions. There the personal factor does not enter to a material degree. Delegates will not stand for reëlection, will not be rewarded or punished for what they may say, except by the shadowy influences of reputation. The paramount concern is not who said it, but what was said, for to this, if it be helpful, the courts will look for help in construing the fundamental law. More than two scores of cases could be cited in which the highest courts of various States have accepted the debates of Constitutional Conventions as evidence of what was meant by amendments there adopted. The judges have indeed characterized the printed copies of the debates as "the most unequivocal proof." For this reason alone, if for no other, the proceedings of such conventions should be carefully preserved in full.

The publication of speeches in a form essentially different from that in which they were delivered, or of speeches that were in fact not delivered at all, presents a different question. As far as I am aware, the practice is confined to Congress. Complaint about it appeared in 1852, and since then it has been the subject of intermittent criticism. The House of Representatives is the offender, if there be offense, for it has not been the custom of the Senate to permit members to "extend" their remarks in the "Congressional Record." A Senator may delay the publication of a speech, for revision, which sometimes goes to the point of embellishment, and he may get permission to add quotations or

statistics, but the burden of the speech is presumed to be as it was spoken. Representatives, however, under a formal permission "to revise and extend," rarely denied upon the request for unanimous consent, elaborate into long addresses remarks that were very brief, or even perpetrate what appear to be orations when not a word has been spoken.

Two or three times the Senate has asked the House to abandon the practice, but in vain. The Senatorial attitude, however, has not been so virtuous as it seems. The Senate is less than a quarter as large as the House, and its members can say all they want to on the floor. The size of the House precludes such freedom of speech. There is not time for everybody to be heard.

If it were true that speeches in the greatest forum of the land might properly have no other purpose than to affect the vote of the House on the question at issue, then there would be no excuse for the printing of sentences never spoken. That, however, is not true. A legitimate function of Congress or Parliament is to develop and disseminate information on questions of widespread public interest. In most of the national assemblies the end is accomplished in part by questions addressed to the Ministers and the replies thereto, for which a definite period of the sittings is used. This allows the discussion of many topics that may not be related to the immediate work. The lower branch of Congress permits nothing of this except in the course of what is known as "general debate" on the measure happening to be before the House. Unless this general debate is by special rule or agreement restricted to the subject of the measure, those members getting "time" through the favor of the two committee members leading the fight for and against the bill may talk upon any subject that suits their pleasure. Their allotments of time usually being small, the speakers naturally wish to round out their speeches for publication.

Also it often happens that men who in the course of running debate have been cut short by the five-minute rule feel that justice to their reputations calls for the privilege to expand what they have said before it reaches the eyes of their constituents.

With the actual conditions in mind, it will be seen that there is really but slight ground for criticism if the practice is kept within reasonable limits. The trouble is that such limits cannot be formulated. They must be left to the conscience and the com-

mon sense of the individual member, which inevitably results in more or less abuse of the privilege.

Former Speaker Champ Clark said in his "Quarter Century of American Politics" (1, 359) that for a long time he was opposed to members printing in the "Record" words, editorials, articles, and speeches not delivered in the House; but he finally changed his mind. "I concluded that it was preferable to let them be printed rather than be compelled to listen to them." More seriously he went on to give another reason, namely, that some speeches printed in the "Record," though never delivered in Congress, are of much value, the most remarkable case perhaps being that of the famous Silver speech of John G. Carlisle, most frequently quoted of all his addresses. Carlisle wrote it in the quietude of his library and inserted it in the "Record" under a blanket leave to print granted to all members on a particular bill.

On the whole I am inclined to think that there would be a balance of gain if delayed publication were prohibited. Were the members restricted to such extension of remarks as they could attend to between the receipt of the stenographer's transcript and the last hour that evening for turning in copy, much would be gained. The deceptive publication of alleged speeches, of which not even the germ has been part of the actual proceedings of the House, seems to me indefensible. If such matter ought to be circulated at the public expense, let it not be under false colors, but let it go out honestly in pamphlet form if approved by the Committee on Printing. The result of such a course would undoubtedly be to save some considerable part of the half million dollars and more that the "Congressional Record" now costs every year.

The right to revise ought not to be disturbed. The best of stenographers make some slips and the use of machines in transcribing adds to the danger of misquotation. Figures of speech may be changed into banalities, epigrams into commonplaces, pathos into bathos. Allusions may be perverted, quotations may be marred. Furthermore, every public speaker can legitimately correct his grammar and polish his rhetoric before his words go into print. Reasonable amplification to make the meaning clearer is surely permissible, and the omission of redundancies is above question. In brief, a speaker may fairly do at any rate what a copy editor would do, and something more, for the speaker knows what he meant to say, and this it is that really

concerns the reader. How far the reviser may also recognize what he ought to have said, how far upon reflection he may alter the spirit and substance of his remarks, is a matter every man must decide for himself. In the House he will get into trouble if as a result of his decision he does an injury to a fellow-member. Barring this he may usually indulge his inclination with impunity.

In the excitement of debate men will sometimes say unjust or even untruthful things that may do others irreparable injury if put into print. Should their publication be permitted? Unfortunately there is no way to prevent it without a greater mischief — the hampering of free speech. Censoring is impracticable. The Canadian House was threatened in the session of 1918 with a resolution that would have thrown on the Speaker the duty of censoring before publication. Doubtless this was suggested in view of the conditions attaching to the World War, then not ended. Fortunately the Government did not press for its passage. Under no conditions should there be permitted such an invasion of the rights of representatives. The public welfare demands the fullest opportunity for criticism, however unfair or seemingly dangerous. As for private welfare, every legislator must take his chances, relying upon the opportunities for vindication, or, in their lack, upon the support of a clear conscience. Legislative bodies believe in fair play, and only in extreme cases will it be denied. Parliamentary law guarantees the right to rise to a question of privilege, and this ordinarily ensures the chance to explain or defend, when the attack has been made by one member on another. If it has been made upon an outsider, as for example on some administrative official, there is no adequate recourse for the victim. This is most regrettable, but nobody has ever suggested how it can be helped without a worse evil through interference with the most precious institution of a republic — freedom of discussion in popular assemblies.

CHAPTER XV

VOTING

Votes may be wholly secret, as when taken by writing; or they may be disclosed to those present, as when taken by standing; or they may be made known to the public by the record of what are known as the Yeas and Nays.

There has been singularly little discussion of whether, as concerns a lawmaking body itself, votes should be secret or open. The question has rarely come to the front save in the matter of the election of presiding officers. The Federal House began with electing the Speaker by ballot, and that practice continued up to and including the election of James K. Polk in 1837. James Buchanan had suggested change to voice vote in 1826 and the matter received much discussion in 1829, but not till the long contest of 1839 did the opponents of secrecy prevail. In Massachusetts the ballot was used until within a few years, being discarded on the occasion of a contest when the dominant party had but a narrow margin and feared that if the ballot were secret, enough men would trade with the minority to bring it success. There can be no question that the advocates of election *viva voce* are gaining ground. More than half the States now direct in their Constitutions that elections by the legislature shall be *viva voce*, and to that provision Georgia adds a specific injunction in the case of the Speaker. Oklahoma, on the contrary, excepts officers and employees of either House from the general provision. The requirement of the voice vote appears in the rules of a few Legislatures, but most of them are silent on the subject.

Italy goes in the other direction beyond any American requirement by saying in her Constitution (Article 63): "Votes shall be taken by rising and sitting, by division, or by secret ballot. The latter method, however, shall always be employed for the final vote on a law and in all cases of a personal character."

Secret voting on measures would greatly embarrass those lawmakers who are averse to doing their own thinking. Such there have always been in legislative bodies; such there always will be. Dr. Johann David Schoepf, who traveled through several of the States in 1783–84, found in the Pennsylvania Assembly a group of German-born members. He was not complimentary

to his brethren. "When the votes are to be taken," he wrote, "those in the affirmative rise, and those in the negative remain sitting. The members of German descent (if, as is sometimes the case, from a lack of thorough readiness in the English language they either do not properly grasp the matter under discussion or for any other reason cannot reach a conclusion) are excused for sitting doubtful, until they see whether the greater number sits or stands, and they do the same so as always to keep with the largest side." [1]

It is to be wished that no worse an explanation than that of unfamiliarity with language were ever possible. On the other hand, it would not be fair to ignore the fact that every wise legislator knows he is not expert in every matter on which he must vote. Often he must rely on the judgment of those in whom he puts confidence. He will be inclined to "follow the committee" unless he has some reason for mistrusting its advice. If the committee is divided, he will look to men either in or out of the committee upon whose wisdom he thinks he can rely. So when he has not heard the debate or the debate has not clarified his mind, he is not to be wholly condemned if he watches to see how some others vote and allows their course to shape his own decision.

As for the public, if it were best to delegate authority in full to representatives, and to hold them responsible only for results, then there would be no occasion to know anything about the details of their work. The ideal illustration of this is the Federal Convention of 1787, which sought to be judged solely on its product. The people of its time were not permitted to know either what any of its members said or how they voted. Yet that very Convention recommended the following paragraph for governing the Congress it proposed and this has ever since been the constitutional provision: "Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the Yeas and Nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal."

At the start of the Convention, when the committee to prepare standing rules and orders made its report, Rufus King objected to that rule which would have authorized any member to call for the Yeas and Nays, and have them entered on the minutes. "He

[1] *Travels in the Confederation*, I, 383.

urged," Madison tells us, "that, as the acts of the Convention were not to bind the constituents, it was unnecessary to exhibit this evidence of the votes; and improper, as changes of opinion would be frequent in the course of the business, and would fill the minutes with contradictions." Colonel Mason seconded the objection, adding that "such a record of the opinion of members would be an obstacle to a change of them on conviction; and in case of its being hereafter promulged, must furnish handles to the adversaries of the result of the meeting." [1]

The next day Charles Pinckney presented his Plan. It provided for the Yeas and Nays in Congress, leaving blank the number of members who might get them. Nothing more appears on the subject until the report of the Committee on Detail, August 6, which provided for the Yeas and Nays at the desire of one fifth of the members present.[2] When this was reached in the course of debate, Gouverneur Morris urged that if the Yeas and Nays were proper at all, any individual ought to be authorized to call for them. He made a motion to that effect and Edmund Randolph seconded it. Roger Sherman had rather strike out the Yeas and Nays altogether. "They have never done any good, and have done much mischief. They are not proper, as the reasons governing the voter never appear along with them." Oliver Ellsworth was of the same opinion. Nathaniel Gorham was opposed to allowing a single member to call for the Yeas and Nays, and recited the abuses in Massachusetts: first, in stuffing the Journals with them on frivolous occasions; secondly, in misleading the people, who never know the reasons determining votes. The motion of Morris to amend was disagreed to, *nem. con.*, and the next day the provision was agreed to, also *nem. con.*

With such little controversy was established a practice that has come to play a most important part in the lawmaking machinery of the land.

It will be observed that the debate proceeded as if the practice was already familiar. So it may have been, but the evidence to that effect is strangely scanty. Little is known of its origin. It has been called an American practice rightly enough, for it reached maturity here long before it gained strength elsewhere. Not until 1836 was it accepted by the British Parliament. Yet there are traces of it in England long before. R. Palgrave says that the first publication of division lists of Parliament occurred

[1] *Elliot's Debates*, v, 124. [2] *Ibid.*, 407.

in April, 1641, when the names of those who had voted against Strafford's attainder were posted up as "betrayers of their country," and a like document emanated from the other side. Porritt says it was at the dissolution of 1679 that division lists were for the first time published as electioneering literature, unofficially.[1] Macaulay says it was at the election of 1690, when the Whigs circulated a list of Tories who had voted against declaring the House vacant, and the Tories a list of Whigs who had supported the Sacheverell clause.[2] In 1696 the Commons declared the printing of the names of a minority a breach of privilege, as destructive of the freedom and liberties of Parliament. Burke in 1770 advocated the official publication of division lists. In 1782 they were again published unofficially as electioneering literature.

It was not, however, until 1836 — four years after the passing of the Reform Act — that the House of Commons adopted what May calls the wise and popular plan of recording the votes of every member; and publishing them, day by day, as part of the proceedings of the House. "So stringent a test had never been applied to the conduct of members; and if free constituencies have since failed in their duty of sending able and conscientious representatives, the fault has been entirely their own."[3] And Bryce says that until 1836 one party remained in the House while the other retired into the lobby, and only the numbers were recorded. Much dislike was at first evinced to the new plan, and the tellers sometimes found it difficult to ascertain the names of members as they walked past them. At present the tellers merely count the numbers, and the names are taken by four division clerks.[4]

In some Parliaments the divisions waste an inordinate amount of the time of the House. For instance in 1909 their number reached a total of 920. That this was an abuse of partisanship may be inferred from the fact that in the war period the total went as low as thirty-four. For the last twenty years the average has been about 350.

In Belgium "the vote on a law as a whole shall always be by roll-call and *viva voce* vote."

The origin of the practice in America might usefully busy some candidate for a doctorate with time and patience enough to

[1] *The Unreformed House of Commons*, I, 587.
[2] *History of England*, chap. xv. [3] May, *Const. Hist. of England*, I, 407.
[4] *The American Commonwealth*, I, 45, note.

explore the manuscript Journals of the colonial assemblies. Ellis H. Roberts says in his "New York" (I, 281) the Yeas and Nays were first recorded in that State in the Assembly chosen in June, 1737. Examination of a volume of the Massachusetts records for an early period of the Revolution does not show me any list of Yeas and Nays. On the other hand, among the rules adopted by the Provincial Congress, ten days after Lexington and Concord, was this: "No member shall declare, or question, whether it be a vote or not." [1] In point of procedure, at any rate in Massachusetts to-day, a call for the Yeas and Nays is a step in doubting and verifying a vote, the usual practice being for a member to doubt the declared result of a voice vote, and after that has been verified by the count of a standing vote, for him to ask the roll-call. If such was originally the theory, manifestly it would be wholly inconsistent with a rule forbidding any member to question a vote.

Pennsylvania seems to have been accustomed to the practice almost if not quite from the start. One of the rules adopted for its Assembly in 1703 required "that all Questions put by the Speaker to know the Mind of the House by vote, be answered by the Members standing up, and saying Yea, or Nay, as they shall see meet." The principle itself, therefore, was not novel when the authors of the Pennsylvania Constitution of 1776 gave any two members the right to require "Yeas and Nays," a right that has continued for any two until to-day.

In view of the Pennsylvania provision it must have been an oversight that led Cushing to say the practice "appears to have been first made use of by the Congress of the Confederation." He goes on to inform us that "in the first code of rules promulgated by Congress in July, 1777, there is no mention whatever of the subject; but in the following August a specific rule was made, by which Congress resolved, 'that if any member chooses to have the Ayes and Noes taken upon any question, he shall move for the same previous to the president's taking the sense of the house on such question, and, if the motion be seconded, the individual members of each State shall be called upon to answer AYE or NO to the question, which answer shall be entered on the Journal, and the question be determined by the majority of States, as the majority of votes in each shall make appear.'" [2]

[1] *Journals of the Provincial Congress*, 164.
[2] *Law and Practice of Legislative Assemblies*, 164.

The Yeas and Nays were first entered in the Journals of Congress upon the question of General Arnold's rank, August 9, 1777, when a majority voted against his being restored. Party considerations seem to have entered into the matter. Seven States voted in the negative and four in the affirmative. The rule was inserted in the code of May, 1778, and again in that of May, 1781, and continued in force until the adoption of the Constitution of the United States.

Whether or not the practice had gained a foothold in Massachusetts before her Constitution was adopted, John Adams, who wrote that instrument, must have known the congressional use of it. He did not follow Pennsylvania in making it a part of the ordinary usage of the General Court, but did provide for the Yeas and Nays whenever the Governor should return a bill with a veto message. In the first session of the House after the adoption of the Constitution, the privilege of calling for the Yeas and Nays was given to any fifteen members. It must have been between 1780 and 1787 that the use grew into the abuse of which Gorham spoke in the Federal Convention. Now one eighth of the members of the House and one fifth of those of the Senate may get a roll-call in Massachusetts. Vermont, following the lead of Pennsylvania in this as in so many other particulars, directed the Yeas and Nays in her Constitution of 1777, but began by restricting the privilege to one third of the members. In 1786, however, it gave any member the power to get a roll-call, and continued this until 1913, when demand of five Representatives was substituted, one Senator still having the right. New Hampshire, when first making provision for the roll-call, in 1784, also put it at the command of any one member, and such is yet the rule. In her Convention of 1912 it was moved to amend so that the motion of one member for the Yeas and Nays must be seconded by ten others, but the resolution was rejected.

The Conventions of New York and Rhode Island for ratifying the Federal Constitution each desired that the Yeas and Nays should be had in Congress at the request of any two members, but nothing came of the wish. It shows, however, that from the start importance was attached to the degree of ease with which public record might be secured. Great variety of opinion on this point developed as from time to time States came to form and revise Constitutions, or provide for the matter by legislative rules. Confining the analysis to constitutional provisions, it would ap-

pear that only Delaware (1792) followed Vermont and New Hampshire in giving the right of call to a single member, save that Maryland (1851) allowed it to one Senator. Pennsylvania's example of "two members" has been followed by Kentucky (1792); Tennessee (1796), changed in 1870 to five; Georgia (1798), changed in 1865 to one fifth; Ohio (1802); Louisiana (1812), changed in 1879 to one fifth; Indiana (1816); Illinois (1818), changed in 1870 for the lower branch to one fifth; Alabama (1819), changed in 1867 to one tenth; Missouri (1820); Florida (1838), changed in 1868 to three, and in 1885 to five; Iowa (1846); Oregon (1857); Nebraska (1875), changed from three Senators or five Representatives at first (1866); South Carolina (1868), changed in 1895 to five Senators or ten Representatives; Colorado (1876); Montana (1889); Wyoming (1889); Arizona (1910). Three was the number preferred by Mississippi (1817), changed in 1868 to one tenth; Texas (1845); California (1849); Nevada (1864); Idaho (1889). Arkansas (1836) and Utah (1895) made it five; and Maryland (1851), five Delegates.

Connecticut (1818) was the first to copy the congressional rule — "one fifth of those present." Maine followed (1819); then Rhode Island (1842); New Jersey (1844); Virginia (1850); West Virginia (1862), changed to one tenth in 1872; North Carolina (1868); New Mexico (1910). Michigan, which from 1835 to 1850 had required one fifth of those present, then changed it to those elected, going back in 1908 to those present, from a desire to ensure greater publicity for the acts and votes of individual members. Undoubtedly it was the same motive that led to the choice of one sixth rather than one fifth by Wisconsin (1848); North and South Dakota (1889); and Washington (1889). Louisiana requires one fifth of those elected. Oklahoma went still farther (1907) with permission to one fifteenth.

Presumably to check filibustering, Indiana in 1851 inserted the proviso that on a motion to adjourn it should take one tenth of the members present to order the Yeas and Nays. Oregon copied that in 1857.

At the beginning of the second third of the nineteenth century, various States began to feel the need of a tighter rein on their lawmakers. One of the precautions devised was a constitutional requirement for the Yeas and Nays on final passage of measures. Tennessee appears to have begun this, applying it in 1834 to

"every bill of a general character, and bills making appropriations of public moneys." Florida in 1838 applied it to all bills, and was therein followed by New Jersey in 1844 and New York in 1846. Such influential examples led the newer States to copy the idea in quick succession. Before the Civil War it had been adopted by Illinois (1848), Michigan (1850), Ohio, Indiana, and Maryland (1851), Iowa and Oregon (1857), and Kansas (1859).

Since then it has been adopted by every other State that has revised its Constitution, excepting South Carolina, New Hampshire, and Massachusetts, which would have none of it; North Carolina, Georgia, and Mississippi, which applied it to money bills only. West Virginia, starting with the proviso, dropped it in 1872. Texas, which adopted it in 1868, dropped it in 1876. In its full application it now prevails in thirty-four States, for money bills in four; and the matter is left to the judgment of the members in ten — the New England States, West Virginia, South Carolina, Texas, and Minnesota. North Carolina has since 1868 required three readings of money bills on different days, with the Yeas and Nays on the second and third. Louisiana, since 1879, besides requiring the Yeas and Nays on the passage of all bills, has required them on the concurrence by one House in amendments made by the other, and on conference committee reports. Nebraska put a like requirement into her Constitution in 1920, not so much for the sake of publicity as because it had been found that in the closing days of the session important amendments and conference reports, sometimes carrying large appropriations, would be accepted by less than a majority of all the members elected — the vote required for the final passage of bills in Nebraska as well as in Louisiana.

Experience under such requirements shows the folly of demanding useless effort from Legislatures. Many bills are of a routine nature; many appropriations are perfunctory. It was absurd to expect that any assembly would waste from ten to twenty minutes in a genuine roll-call on each of such things. The result has been a widespread evasion of the rule that has thrown the rule itself into disrepute. Note, for instance, what takes place in New York. "The Clerk mumbles through a dozen or so names on the list and then announces that the bill has been carried by a vote given out approximately as the parties are divided in the house. Members who wish may transfer their votes from the side on which they would normally be announced. The

entries on the Journal are made by inserting the party division, often with minor modifications. At a recent session, it is reported, measures were passed by the Assembly in this way, with only half a dozen members present, which authorized expenditure of almost $2,000,000." [1] In the Senate of that State there were in one year (1899) 1235 Yea-and-Nay votes, of which 961 were unanimous. No sane man would expect a body of sane men to use dreary exactitude and painstaking care in calling the roll to record 961 unanimous votes.

An omnibus roll-call consists of calling the roll for a vote on several measures at the same time. Governor Hodges of Kansas told the Governors' Conference of 1913 that in the last days of the Legislature in his State bills were rushed through by the use of this device. Said the Governor: "A great many legislative sins are committed by the omnibus method. Measures that meet the positive disapproval sometimes of a majority of the House or Senate, are omnibused, when if considered separately in either body, their passage would be impossible. I know of enactments upon the statute-books that, after passing one branch of the Legislature, were objected out of an omnibus reading and roll call and were never voted on in the Senate at all, but were shown afterwards by the Journal as having passed the Senate in the usual legal way." [2] It is with astonishment, incredulity, and sorrow that one accustomed to the law-abiding habits of New England Legislatures learns that such a practice prevails anywhere in what he supposed was a civilized country. He thereafter finds it more difficult to wield the cudgel in defense of American Legislatures.

In North Carolina when a number of money bills are up for consideration, they are put on a separate calendar. On the first bill the roll is called and the names are entered on the Journal. On the rest only a few names are called. A hundred bills may thus be passed, upon which the names of not more than half a dozen members will be called, but the whole number will be recorded as having voted for the bill. Evasions of a kindred nature are frequent in nearly all States where roll-calls are obligatory, regardless of the importance or triviality of the measure. Missouri tried to meet the temptation by requiring, in 1865, that the

[1] C. L. Jones, *Proceedings*, Am. Pol. Sci. Assn., December, 1913, to January, 1914, p. 214, citing *New York Evening Post*, November 22, 1913.
[2] *Proceedings*, 252.

whole list of members should be called, and the names of absentees noted and published with the Journal. It would be better to remedy the situation by removing the requirements from the Constitutions, leaving the Legislatures to make such rules as they see fit. The New England States have always got along satisfactorily without such requirements and it is probable that even though they may have once been needed in States where lawmaking has at times been conducted on a lower level, the standards are now high enough everywhere to let the Legislatures govern themselves in this matter.

The utility of the Yeas and Nays for getting an accurate record of a vote is not to be gainsaid. Beyond that, their value is an open question. Assuming that it is best for constituents to be informed of each act of their representatives, yet it is far from certain that records of roll-calls disclose the votes adequately or that they accurately inform. There are such things as half truths, and often the record of a vote is in effect a half truth. Often it fails to show the real nature of the matter decided. Titles of bills are necessarily brief and rarely tell the whole story. Again and again a legislator will sympathize with a measure, will desire what its title purports to give, and yet be compelled to vote against it because he knows it is improperly drawn or because he thinks it will not accomplish its ostensible purpose or because it will also accomplish some other purpose of more harm than enough to offset the good. Every legislator has seen a wise bill, for which he has voted at one stage, ruined by amendments at the next, forcing him to reverse his vote. Or again the time may not be ripe for the measure; or some other step ought to be taken first; or a measure may be undesirable unless some other measure goes with it. Any one of a score of perfectly legitimate reasons the public will never know may lead a conscientious and honorable lawmaker to record his vote in a way that will put him in a false light, and may bring to him political ruin.

On the other hand, if we assume that public opinion is a valid influence to be kept steadily at work on legislatures, then the roll-call is necessary, for it must be recognized that a large proportion of legislators will vote contrary to their best judgment if they fear that otherwise their votes when known will be the basis of political punishment or deprive them of the opportunity for advancement. Repeatedly voice votes will be reversed on roll-call. That is no new aspect of human nature. It is recorded of

Philip IV of Spain that he asked the opinion of his Council on a certain subject. The opinion was unanimously adverse; whereupon the monarch ordered every councillor to send in his vote signed with his name, and every vote turned out to be in favor of the proposed measure. Francis Lieber, telling the story, adds: "The Ayes and Noes have unfortunately sometimes a similar effect with us." [1] From this it would appear that Lieber thought the result discreditable, and so it was, to the councillors, but whether it was unfortunate for the King is another question.

It is hard to strike the balance. If all legislators were wise and honest, able and sincere, the Yeas and Nays would be a useless, harmful encumbrance. If all were shifty and self-seeking, stupid and dishonest, the Yeas and Nays might be the shield of society. But of legislators it is to be said as of mankind at large:

> "There are some that are good and some that are bad,
> Even as you and I."

Taking the usual American Legislature, my own judgment would be that were the final vote on bills to be by secret ballot, as the Constitution of Italy requires, fewer bills would become laws, because more men are by nature conservative than progressive, more men dislike than desire change, where their own interests are not at stake. In other words, the secret ballot would in a democracy impede progress, except at the revolutionary crises. If really secret, it would lessen corrupt legislation, for the buyer would rarely know whether, in the popular phrase, the seller had delivered the goods. It would take away from the man without conscience one considerable opportunity to curry favor with the people. It would relieve the man with conscience from embarrassments and menaces that now bring disturbing anxieties into his work. It would conduce to independent exercise of judgment, and that means the virtues as well as the dangers of self-reliance. On the whole, we should have better legislators and a net loss in useful legislation.

Some of the harm done by Yea-and-Nay records would be avoided were it practicable to accompany them with explanations. The idea is ancient. From time immemorial the peers of the English House of Lords have had the right to add to their votes a record of their opinion, and the grounds for it, by a "protest," which is entered in the Journal, together with the names

[1] *On Civil Liberty and Self-Government*, 263.

of all the peers who concur. The earliest instance on record of a protest with reasons is of September 9, 1641; but the practice of simple protests without reasons is more ancient. Lord Clarendon says in speaking of this practice: "It was an old custom and privilege of the House, that upon any solemn debate, whoever is not satisfied with the conclusion and judgment of the House, may demand leave to enter his protestation, which must be granted." He adds that in 1641 the custom arose of the minority entering their protestations in trivial cases, and "they altered the form, and instead of short general entries, caused the matter of the debate to be summed up." This, however, met with objection.[1]

That the custom was then thoroughly familiar to Englishmen is indicated by the appearance in that same year of a paragraph in the Body of Liberties of Massachusetts Bay, declaring that a minority in "any Court, Councell or Civil Assembly" were to be at liberty "to make their contra Remonstrance or protestation in speech or writing, and upon request to have their dissent recorded in the Rolles of that Court. So it be done Christianlie and respectively for the manner. And their dissent onely be entered without the reasons thereof, for the avoiding of tediousness."

Note that last clause. Human nature appears to have shown much the same characteristics in the lawmaking assemblies of the seventeenth century that we smile at or worry about in the twentieth.

Four years later the Deputies restricted the privilege further. "Itt was resolved upon the quaestion, by vote," the record reads, "that no member of this howse shall have liberty henceforward to enter his contradicent to any vote that shall passe this howse in the absence of such members, when such absence is occacioned by their oune private occacions." [2]

When our fathers came to devise governments for the States, this old idea still appealed to the sense of fair play. So the Pennsylvania Constitution of 1776, giving any two members the right to require the Yeas and Nays, further said, "and when the Yeas and Nays are so taken every member shall have the right to insert the reasons of his vote upon the minutes, if he desire it." North Carolina said in that same year: "Any member of either House of General Assembly shall have liberty to dissent

[1] H. Cox, *Institutions of the British Govt.*, 143.
[2] *Records of the Colony of the Mass. Bay in N.E.*, III, 19.

from, and protest against any act or resolve, which he may think injurious to the public, or any individual, and have the reasons of his dissent entered on the Journals." Vermont in 1777 gave its Council members the right to have their dissent entered on the Journal, with reasons, and in 1786 gave it to any member of the lower branch. New Hampshire embodied the same idea in the Constitution of 1792. A dozen other States have copied it in one form or another. For instance, Ohio in her first Constitution (1802) said: "Any two members of either House shall have liberty to dissent from and protest against any act or resolution which they may think injurious to the public or any individual, and have the reasons of their dissent entered on the Journals." In 1851 this was changed to read: "Any member of either House shall have the right to protest against any act, or resolution thereof; and such protest, and the reasons therefor, shall, without alteration, commitment, or delay, be entered upon the Journal."

In North Dakota, by rule, "when a member rises to explain his vote upon any measure before the House, while the roll-call is in progress, his words shall be taken down by the stenographer and printed in the Journal; and upon request a member may have his remarks upon any question taken and extended on the record." In Georgia, also by rule, on all questions except such as are not debatable, on the call of the Yeas and Nays a Senator may as a matter of right have five minutes, and a Representative three, in which to explain his vote. In other language the Kansas Senate makes the same provision. On the other hand, the rule of the Florida House says, "no member shall be permitted to explain his vote during call of the roll, but he may reduce his explanation to writing and the same may be spread upon the Journal."

Unfortunately, for some reason not quite clear, such provisions have in practice had little efficacy. They do not protect candidates for reëlection against unfair use of the record. Probably such protection is impossible. As long as any record exists, it can be distorted and misrepresented by a vicious rival or a dishonorable newspaper. There is no remedy save in developing the spirit of fair play in politics.

The Ethical Phase

Nobody without experience in a lawmaking body appreciates the variety and complexity of the considerations involved in

voting. Many a question must be examined in its relation to other questions, and of these the observer from the outside may be wholly ignorant. The remedy proposed for an evil may not seem to the voter the best remedy; or defect in detail may overbalance the merit of the principle; or the time may not be opportune. If a proposal is repugnant, should votes on amendments be cast with an eye to making it more obnoxious in the hope that in the end it will be defeated, either at once, or in the other branch, or by a veto? Should a law disliked and found defective be made workable?

One man so strongly opposes a change that he declares: "In my opinion this is bad and therefore I cannot conscientiously do anything that will even help it to be better."

Another man says: "I, too, think it bad, but in my judgment it is inevitable, and I will do what I can to lessen its injuries."

Which is the wiser statesman?

To illustrate: If the electorate by mass vote is to say Yes or No to a measure, can any political proposition be clearer or sounder than that they should know what the measure is? Twice a bill to secure this, by furnishing to each voter a copy of every measure submitted for referendum, met the unanimous approval of the Joint Committee on Election Laws of the Massachusetts Legislature, the House Committee on Ways and Means, the Senate Committee on Ways and Means — three separate committees — and the House itself. Twice it was defeated in the Senate by the opposition of one man so bitterly opposed to the referendum that he was bound to block anything which might make it workable. He could not see that the use of the referendum was sure to grow, or seeing, would not share in helping it even in the most indirect way. Was his the part of statesmanship?

Such are some of the more serious questions that bring anxiety to the lawmaker. The relations of the chamber bring others not so perplexing in the abstract, but in practical effect even more awkward. When may one vote against the majority of his fellow partisans? When may he risk impairing the prestige and influence of his committee?

Apropos of one of these problems, it may be worth while repeating here a reminiscence by Senator George F. Hoar, relating to his colleague from Massachusetts. "I should like," said Mr. Hoar, "to put on record one instance of the generosity and affec-

tion of Mr. Dawes. He had not voted when his name was called, expecting to vote at the end of the roll-call. He meant to vote against the passage of the bill over the veto. But when he heard my vote for it, he saw that I was bringing down on my head a storm of popular indignation, and made up his mind that he would not throw the weight of his example on the side against me. So, contrary to his opinion of the merits of the bill, he came to my side and voted with me.

"I suppose a good many moralists will think that it is a very wicked thing indeed for a man to vote against his convictions on a grave public question, from a motive like this, of personal friendship. But I think on the whole I like better the people who will love Mr. Dawes for such an act, than those who will condemn him. I would not, probably, put what I am about to say in an address to a Sunday-school, or into a sermon to the inmates of a jail or house of correction. I cannot, perhaps, defend it by reason. But somehow or other, I am strongly tempted to say there are occasions in life where the meanest thing a man can do is to do perfectly right. But I do not say it. It would be better to say that there are occasions when the instinct is a better guide than the reason. At any rate, I do not believe the recording angel made any trouble for Mr. Dawes for that vote." [1]

Personal Interest

It is an ancient rule that members of a lawmaking body shall not vote on matters in which they have a personal interest. Jefferson, referring to Hatsell, said: "Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice has been disallowed, even after a division. In a case so contrary, not only to the laws of decency, but to the fundamental principle of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule of immemorial observance should be strictly adhered to."

The House of Commons has a distinct rule on the subject, covering direct pecuniary interest, which must be immediate and personal, and not merely of a general or remote description. In 1796 a general resolution was proposed in the Lords, "That no peers shall vote who are interested in a question"; but it was not adopted. Presumably, however, such a resolution was deemed

[1] *Autobiography of Seventy Years*, II, 8.

unnecessary, on the ground that the personal honor of a peer would prevent him from forwarding his own pecuniary interests by his votes in Parliament. By standing order, No. 178, Lords are "exempted from serving on the committee on any private bill wherein they shall have any interest." [1]

If any legislative body in the United States lacks a formal rule on the subject (no such lack has come to my notice), it is either because parliamentary law is properly assumed to cover the matter, or else because constitutional provision is held to suffice. In 1873 Pennsylvania put into her Constitution: "A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly shall disclose the fact to the House of which he is a member, and shall not vote thereon." A dozen Constitutions now say much the same thing.

On the face of it the Pennsylvania rule appears simple, clear, and eminently reasonable. Yet a moment's study of it brings trouble. What means the "or"? Does it differentiate "personal" and "private"? Wherein do they differ? The uncertainty led the Pennsylvania Commission on Constitutional Amendment and Revision in 1920 to advise that "personal or" be omitted. "The distinction sought to be made," said the Commission, "is between public and private interests. A personal interest, as, for instance, a personal interest in a particular hospital seeking an appropriation, is not objectionable, and it was not the intent of the section that a member should expose such a personal interest to the House of which he is a member."

The cutting out of "personal or" might help, at least to the extent of relieving us from trying to define "personal," but the Commission was far afield if it thought that "private" would present no uncertainty. As a matter of fact with the prospect of the individual interpretation and application of that word begins one of the most difficult and embarrassing struggles that may torment the conscience of a scrupulous lawmaker. He must settle it for himself. With rare exceptions presiding officers have refused to guide or admonish, and assemblies have refused to dictate. Points of order, however, have of late years not been wanting, and in connection with them the subject has been much discussed by presiding officers and on the floor.

The matter began to be really troublesome when in the first

[1] Sir Thomas Erskine May, *Law, Privileges, Proceedings, and Usages of Parliament*, 281.

half of the last century the spread of the corporation system involved large numbers of men in relations going far beyond the narrow limits of activity and interest to which society had been accustomed. The resulting difficulty seems first to have shown itself in 1830, when two members of the National House who were stockholders in the United States Bank were excused from voting on the renewal of its charter. Yet though the question was thus brought to notice, and though in the course of the exciting controversy over the Bank it might have been expected that the strong partisan jealousies aroused would lead to remonstrance against the votes of other members known to be stockholders, it does not appear that any point of order was raised. Speaker Robert C. Winthrop of the Massachusetts House, who had occasion to discuss the subject in an exhaustive ruling made February 19, 1840, said the rule seemed to have been regarded as altogether too odious and arbitrary to be put forcibly into operation. It seemed to have been left to operate upon individual conscience, inducing members to decline voting of their own accord, whenever they felt they were liable to be swayed from the discharge of their duties by their private interests, or whenever, perhaps, they were unwilling to incur the suspicion of being thus swayed.

Mr. Winthrop believed it to be a rule of doubtful constitutional justice, in derogation of the rights of the members, adverse to the equality of the representative system, and one which, unless carefully limited, was capable of being wrested to the worst of purposes. His own disposition would be never in any case to apply the rule to a case of corporate interest. Corporations had been so multiplied of late years, and their interests had become so closely interwoven with those of the whole people of the Commonwealth, that it was difficult to imagine cases in which they were entirely distinct. The interests of individual corporations, even, partook largely of the character of public interests. To how large a number of persons must an interest be common, to be entitled to the designation of a public interest. The Western Railroad Corporation had some thousands of stockholders. Was the interest which a member held in common with thousands of others, to be regarded as a private interest? What, then, should be the numerical limit at which an interest should cease to be private, and be acknowledged as public? The members whose votes were in question in the present case were interested

in common with at least a hundred stockholders, and there were frequently more than three hundred operatives employed in the establishment. The Speaker said that if, in any case, he was to be compelled to regard interests like these as grounds for exclusion under the rule, it would only be where the authority for so doing was plain, precise, and unavoidable.[1]

When the matter came up in the National House in 1873 on a question relating to the Central Pacific Railroad, the Speaker, James G. Blaine, said it would be his duty to hold that Samuel Hooper of Massachusetts, a stockholder, had no right to vote, and upon Mr. Blaine's delicate suggestion that he be relieved from embarrassment, Mr. Hooper withdrew his vote. In the following year Mr. Blaine took the opposite position when a point of order was raised against the votes of certain members who were stockholders in national banks, the question before the House relating to acts providing for a national currency and free banking. He held that this was legislation affecting a class as distinct from individuals. He referred to a recent refusal of the House of Commons to exclude the votes of army officer members on a bill to abolish the right to sell commissions in the army. He cited the matter of bounty bills, pension bills, the tariff. "And so," he said, "you can go through the whole round of business and find upon this floor gentlemen who, in common with many citizens outside of this House, have an interest in questions before the House. But they do not have that interest separate and distinct from a class." The decision of the Chair was sustained.

The Senate had gone even farther, though not in a matter relating to stockholders. In 1868, on a resolution to pay compensation to Senators from five Southern States, the point of order that some of those directly interested had improperly voted, was not sustained.

De A. S. Alexander thinks that members of Congress have never shown any disposition to confuse direct and remote private interests.[2] With all due respect to his views and the rulings of Mr. Blaine, I hazard the opinion that the distinction is hard to draw and dubious at best. It is a matter of degree, with a twilight zone of no small breadth between right and wrong. Who shall say that a father with an only son very dear to him has in draft legislation no such distinct interest as to warp his judgment? If

[1] R. C. Winthrop, *Addresses and Speeches*, I, 283.

[2] *Hist. and Procedure of the House of Reps.*, 146, 147.

I may not vote because a stockholder in a railroad corporation, how about it if my wife is a stockholder, my brother, my nephew, and where shall the line be drawn? My livelihood may be dependent on the continuance of certain postal rates, if I publish a periodical; or the maintenance of a navy yard; or certain tariff schedules. How does the fact that I am but one of a class touch the principle involved?

As a matter of fact, however apparently clear and sharp any line drawn on paper, it fails when you come to apply it in actual voting. Furthermore, it is not beyond question that any line whatever should be drawn. No doubt a man should not be a judge in his own cause. Yet after centuries of dispute we have at last decided that a man accused of crime may testify, even though there be fear that his testimony will be prejudiced, if not untruthful. To be sure, though we began with only jurors who knew something of the matter, we now demand just the contrary in important cases, but it is not clear how far the reversal of attitude has been of benefit. May it not be argued that the daily affairs of life justify us on the whole in thinking that knowledge outweighs interest, and that though selfishness may distort the judgments of some men, yet most men will do their duty, and do it the better because they know the facts?

The Right to Silence

Although the question of compelling a legislator to vote rises usually in connection with the matter of a quorum, of course the two things are not necessarily connected. Members may wish to refrain from voting because of reasons quite independent of the parliamentary situation. There was a notable instance of this as far back as Queen Mary's time, when thirty-three members of Parliament went on strike because they found the majority "inclined to sacrifice everything to the Ministry." They were indicted, and six of them submitted to the payment of fines, the Queen's death stopping the proceedings against the rest. It became established in the House of Commons that, as Jefferson quotes it in his "Manual," "every member must give his vote the one way or the other."

That principle was not at the outset universally accepted for American assemblies. One paragraph of the Body of Liberties adopted by the colony of the Massachusetts Bay in 1641 read: "In all cases wherein any freeman is to give his vote, be it in

point of Election, making constitutions and orders or passing sentence in any case of Judicature or the like, if he cannot see reason to give it positively one way or an other, he shall have libertie to be silent, and not pressed to a determined vote." If such liberality continued long in Massachusetts or found favor elsewhere, it must have been generally thought imprudent by the time of the Revolution, for the opposite doctrine appears to have been incorporated as a matter of course in the rules provided for both branches of Congress.

The rule of the House of Representatives directed that "every member who shall be in the House when the question is put shall give his vote, unless the House shall excuse him." John Quincy Adams was the first to deny the binding character of this rule. It was in 1832, when the House was to vote on the question of censuring Representative William Stanberry of Ohio for an improper reference to the Speaker. Adams asked to be excused from voting, presenting his reasons in writing. The House refused, whereupon Adams remained silent when his name was called. A protracted debate followed on a motion to reconsider the vote whereby he had been refused. The ex-President explained that he was impelled by no motive of contumacy or disrespect, but was silent on grounds of conscience. With prophetic instinct Foster pointed out what might follow: If one member could refrain, enough could refrain to break the quorum, and there would be an end to all important legislation. The stubborn Adams persisted. Drayton offered a resolution that in view of the breach of the rules, a committee should report the course to be adopted in a case at once so novel and important. In the end the matter was tabled.

Again, in 1836, Mr. Adams asserted his view. The Speaker had ruled that the House might protract its session after midnight of a Saturday, and with an appeal pending, it was moved to adjourn. When the Yeas and Nays were called, Wise of Virginia stated he declined to vote until Mr. Adams and other members, whose names came before his, had voted, they having remained silent. Beardsley of New York moved that Adams be excused from voting. Adams declined this, saying that he had no conscientious scruples against voting or transacting business on Sunday, but he held the House had no right to sit there at that hour without first passing an express order setting forth that the public business demanded it. The debate has not been recorded, but it is stated

that it was "of an angry and painfully personal character." This is not surprising in view of the course that was making the Massachusetts stickler for rights so obnoxious to the slaveholders from the South. Frequently in the course of his congressional service he refused to vote, and though at first from conscientious motives, an entry in his "Diary" shows he would not have hesitated to use the same means to prevent action on any measure. The House completely failed in its persistent attempts to coerce him, and the result was the establishment of the refusal to vote as a common method of blocking business.

The first rules adopted in the Senate provided that every member present should vote unless excused for special reasons, but there were few attempts to enforce this. In 1881 the presiding officer, reading from the compilation, was justified in saying: "The practice of the Senate in permitting its members, without question, or challenge, to withhold their votes, whenever they have thought fit to do so, has been so uniform and unbroken, that, so far as precedents can make it so, it has become an absolute parliamentary right, and cannot be questioned without reversing the steady practice upon which the members of the body have a right to rely as their protection in the exercise of their discretion in giving or withholding their votes."[1] No attempt to break up this practice has succeeded. The Senate prefers to assume that it is without power in the matter. For instance, in 1893 Senator Vilas called the attention of the Chair to the fact that Senator Dubois had failed to vote, and asked that under the rule he give his reasons. After they had been given, the Senate voted not to excuse him, but when his name was again called, he still refused to vote and the Senate did nothing about it. Rulings have gone to the extent of holding that though when a Senator declines to vote on the call of his name, a standing order says he shall be required to give his reasons, yet the Chair has no authority on his own motion to make the requirement.

In the Senates of New York, Pennsylvania, Colorado, and possibly other States, if a Senator refuses to vote when a quorum is present, he is to be deemed in contempt, and, unless purged, is to be brought before the bar for public reprimand by the President. Two Wisconsin Senators in 1907 sought to break the quorum by refusing to vote on the two-cent-passenger-rate bill. Lieutenant-Governor Connor, presiding, declined to apply the

[1] *Cong. Record*, 3d Sess., 46th Congress, 2423.

Reed rule of counting by sight, holding that the best evidence of a quorum was a roll-call. He overcame the difficulty, however, by directing the obstinate Senators to vote under the rule requiring it, and they complied rather than be in contempt of the Senate.

Virginia takes unique ground. The standing orders of the House of Burgesses of 1769 contained a rule to the effect that every member present must be counted on one side or the other. It is now the rule in the House of Delegates that a member present and failing to vote shall, on the demand of any other member, with the usual exception in case of personal interest, be counted on the negative of the question.

CHAPTER XVI

TECHNICAL MATTER

As a detail of procedure the taking of votes has not yet been worked out to the general satisfaction. Common methods have led to an enormous waste of time, and occasionally to error and even fraud. A very notable, and delightful, instance is to be found in the circumstances attending the passage of the famous Habeas Corpus Act, frequently considered, as Blackstone says, another Magna Carta. Bishop Burnet tells the amusing story of how, in the time of Charles II, Englishmen came by this palladium of their liberties:[1] "The former Parliament had passed a very strict act for the due execution of the habeas corpus; which was indeed all they did; it was carried by an odd artifice in the House of Lords. Lord Grey and Lord Norris were named to be the tellers; Lord Norris, being a man subject to vapors, was not at all times attentive to what he was doing; so a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with this misreckoning after; so it was reported to the House and declared that they who were for the bill were the majority, though it indeed went on the other side; and by this means the bill passed." Speaker Onslow hunted up the Minute-Book of the House of Lords, and compared the number of Lords that day in the House with the number reported to be in the division, finding it agreed with this story.

For centuries divisions have been taken in Parliament by having all the members go out to the lobby and counting them on their return. Until 1888 that was the only means, apart from voice vote, of taking the sense of the House; and any one member could force a division by challenging the result of a voice vote, or rather any two members could do so, for a division cannot take place unless two tellers can be found for each side. In 1888, however, as a part of the movement to prevent obstruction and waste of time, the Speaker or Chairman was empowered, if he should think a division frivolously or vexatiously claimed, to call upon the Ayes and Noes to rise in their places. By the rule

[1] *History of His Own Times*, II, 485 (1680).

of 1919 he may then count them and declare the result, or may direct a division.

In the French Chamber each Deputy is provided with two cards bearing his name in print — one white for "Aye" and one blue for "No." Members remain in their places and deposit a blue or white card (as the case may be) in the urns carried around by attendants. The votes are counted by the secretaries with the aid of mechanical appliances. If the apparent majority is more than thirty, the result is announced forthwith. If, however, a smaller majority is shown, the votes are examined and duplicates excluded. The sitting is suspended during this process, which occupies about half an hour. A different method is employed for money bills and some other things. Deputies deposit their votes in an urn placed on the tribune. Before voting, each member receives a "boule de contrôle," which he hands over to one of the secretaries as he places his vote in the urn. This gives an absolute check on the number of votes cast, and prevents any member from voting more than once.

Despite the rule adopted for the Pennsylvania Assembly in 1703 requiring members to stand and say "Yea, or Nay, as they shall see meet," we may be confident that voting by acclaim, the voice vote, was in colonial times, as it is now, the more common practice. Such a supposition is strengthened by the rule of the Provincial Congress of Massachusetts, that "no member shall declare, or question, whether it be a vote or not." This means that the presiding officer, and not some presumptuous, overbearing member, was to pass judgment on the volume of sound. Of course so inexact a process had to be supplemented by methods of verification. One of the possible methods, the show of hands, often used in our small gatherings, appears not to have met with favor for lawmaking bodies. Instead the rising vote has been preferred. Usually this is the second step in the vote-taking process. In Congress it is secured by the cry of "Division," from any member, but in the Legislature with which I am familiar more formal custom prevails, a member addressing to the Speaker a doubt of the vote.

The use of the word "division" in Congress differs from that in Parliament, where it means the passage between tellers. Congress began by requiring that in case of doubt of a voice vote or of a call for a division, those in the affirmative should pass to the right of the Speaker's chair, those in the negative to the left.

After a few months of trial, division by rising was substituted. In 1837 John Bell of Tennessee proposed and the House adopted the requirement of one fifth of a quorum to order tellers. As the rule now stands, if the Speaker doubts what may have been the voice vote, or a division is called for, division by successive rising of affirmative and negative is taken. If the Speaker still doubts, or at least one fifth of a quorum calls for verification, the Speaker names one member on each side of the question, the two to act as tellers. Nowadays the Speaker never takes the initiative, and the members call for tellers hardly once a week. Perhaps their use was more general when Anthony Trollope visited Congress in 1862. He was diverted by the process. "Two members come forth," he said, "and stand fronting each other before the Chair, making a gangway. Through this the Ayes walk like sheep, the tellers giving them an accelerating poke when they fail to go on with rapidity. Thus they are counted, and the Noes are counted in the same way." [1] It has not been uncommon for somewhat supercilious Englishmen to find amusement in American practices inherited from English forefathers, but it is not easy to understand how so intelligent a man as Trollope could, because he found it in Washington, give a tinge of ridicule to description of a procedure essentially like that used in Parliament for centuries.

At any rate in the Massachusetts Legislature, and presumably in other of the State bodies, tellers have been abandoned, if ever used. In Massachusetts on a standing vote the count is not made by the Speaker, but by monitors, two for each of the four divisions into which the aisles separate the House. Of the two monitors of each division, one is a Republican, the other a Democrat, which ensures agreement in reporting a count that is expected, and generally found, to be exact, though now and then some member will question it and call for a second count, perhaps with reason, for monitors are human and therefore sometimes careless or sly. The process comes near enough precision to make tellers needless.

It is partly for further and final verification that lawmaking bodies of the United States provide for the taking of the Yeas and Nays, that is, voting by roll-call.

The deplorable waste of time in prevalent methods of count is an evil that speaks ill of the capacity of lawmaking bodies for

[1] *North America*, 326.

the exercise of common sense. In Parliament a division ordinarily takes from fifteen to twenty minutes. Mr. Balfour, when introducing his procedure rules in 1902, stated there had been four hundred and eighty-two divisions in the preceding session. Reckoning on the basis of four divisions to the hour, that meant time equal to fifteen eight-hour days passed by members in perambulating the lobbies in order to put their votes on record. In the special session of the 66th Congress (1919), there were in the House fifty-three roll-call votes resulting from the absence of a quorum noted as a vote was about to be taken, and seventy-six upon demand for the Yeas and Nays, a total of one hundred and twenty-nine, averaging to take thirty minutes each — the equivalent of two weeks out of the twenty-six through which the session lasted.

Roll-calls in Congress take twice the time necessary because the roll is called twice, in order that members summoned from their offices by the bells may arrive in leisurely fashion. Herein the American practice is the reverse of the English. We allow any member to vote if he enters the chamber before his name is last called; and if the call takes place because the presence of a quorum has been doubted, a member may even be recorded up to the moment of announcing the result. In Parliament no man can vote unless he is within the chamber when the question is put. When it is known that a division is coming, the Speaker, at the close of the debate and before putting the question, gives the order that "strangers must withdraw." At the same instant the door-keepers shout, "Clear the gallery," and ring the bells in every part of the building. Members wishing to vote hasten to the House, having time to reach there while the messengers are engaged in excluding strangers. If it should be discovered, even several days afterward, that a member had voted, although not within the doors when the question was put, his vote would be disallowed.

In the State Legislatures the waste of time by voting processes is less deplorable only because they are smaller than Congress or Parliament and so the aggregate of lost time is not so great.

The remedy is at hand and already its application has begun. Wisconsin in 1915 voted to install an electrical and mechanical system for registering votes in the Assembly chamber. It was put in operation in the session of 1917, making the Wisconsin Assembly the first legislative body to use such a device. L. C.

Whittet, Speaker of the Assembly, informs me that it proved highly satisfactory and a great saver of time. "Under the old method of calling the roll," writes Mr. Whittet, "it took us on an average of about seven minutes to call the roll and announce the vote. With the electrical voting device the vote could be taken and announced in less than a minute's time. In my opinion no member of the last Legislature would consider going back to the old method." In 1919 Iowa appropriated $18,000 for a like device, and it was put in operation in the session of 1921. The newspaper description of it reports a greater saving of time than in Wisconsin, the assertion being that it saves from fifteen minutes to half an hour on each roll-call. As in Wisconsin a camera automatically photographs the record and leaves it beyond dispute.

The happy day that brings the voting machine into other legislative chambers will put an end to various time-honored phenomena. No longer will the telephone summon shirking absentees from their offices or hotels, for they will not have time to reach the State House. No longer will some men be able to watch other men and vote accordingly. The party boss will find himself hampered in giving orders. By the same token certain well-meaning men, anxious to vote right, distrustful of their own judgments, handicapped by inexperience or want of aptitude for legislative work, who have selected as guides fellow members in whom they place confidence, will be thrown on their own resources and forced to make their own decisions.

Furthermore, decisions will have to be made once for all. There will be no changing of votes at the end of the roll-call. The desirability of preventing that practice has already been recognized in spots. For instance, no member of the Pennsylvania House is to change his vote after the call of the roll unless he declares that he voted under a mistake of the question. In Parliament no man can change even a vote given by mistake. In 1843 on the voice vote a member voted with the Noes. Upon a division he tried to vote the other way and averred he had not intended to vote with the Noes. The Speaker would not admit his excuse and ordered that his vote be counted with the Noes. It would seem, however, that by the ancient rules of the House, a member was at liberty to change his opinion.[1] The

[1] Sir Thomas Erskine May, *Law, Privileges, Proceedings, and Usages of Parliament*, 225.

modern rule seems hard on the careless man, and we are all careless sometimes. Yet on the whole it may be better now and then to work a hardship than to permit the reversal of decisions by the irregular and dangerous practice of changing votes. It can fairly be assumed that most of the changes made without listening to any public discussion after votes have been given, are due to causes that are undesirable if not wholly illegitimate.

We have not carried precaution against guidance to the extreme found in Holland. We have assumed that with calling the roll alphabetically the danger of bell-wethers is negligible. The Dutch, however, take no chances, or, rather, invoke chance for protection. The President of the Chamber draws a number from the box for the purpose of summoning the member who is to vote first; the other members are then called in the order in which they happen to have signed the list of persons present.

Pairing

Pairing, that process by which two members offset their votes, usually in order that one or both of them may be absent without changing the result, was familiar in Parliament a century before it became an established custom here. It was a natural outgrowth of the two-party system and very likely began as soon as the House of Commons got in the way of dividing regularly on party lines. At any rate by 1743 it had become so entrenched that 171 members voted against, to 139 voting for, a resolution "that no member of this House do presume to make any agreement with another to absent himself from any service of this House, or any committee thereof; and that the House will proceed with the utmost severity against all such members as shall offend therein." Since then the system has so developed that members pair with each other for weeks or even months at a time. The system is not formally recognized, but is conducted privately by individual members or by the party whips. It is also practiced by the Lords.

As in England so here the date of the establishment of the system may be said to have been set by the defeat of a resolution. In March of 1840 a Congressman gave as a reason for not voting that he had been "paired off" with another member, whose affairs required him to go home. "It was a strange annunciation," Thomas H. Benton tells us, "and called for rebuke; and there was a member present who had the spirit to administer it; and

from whom it came with the greatest propriety on account of his age and dignity, and perfect attention to all his duties as a member, both in his attendance in the House and in the committee rooms. That member was Mr. John Quincy Adams, who immediately proposed to the House the adoption of this resolution: 'Resolved, that the practice first openly avowed at the present session of Congress, of pairing off, involves, on the part of the members resorting to it, the violation of the Constitution of the United States, of an express rule of this House, and in the duties of both parties in the transaction to their immediate constituents, to this House, and to the country.' This resolve was placed on the calendar to take its turn, but not being reached during the session, was not voted upon."

Benton thought this the first instance of the sort. He had forgotten, if he ever knew, that in 1824 Henry W. Dwight of Massachusetts was excused from voting, as a matter of keeping faith after he had agreed with a Virginia member to leave town, but was detained. If, however, such an instance had not been exceptional before 1840, Benton would surely have known of it. "Since then," he wrote fourteen years afterward, "this reprehensible practice has become common, and even inveterate, and is carried to great length. Members pair off, and do as they please — either remain in the city, and refuse to attend to any duty, or go off together to neighboring cities; or separate; one staying and one going; and the one that remains sometimes standing up in his place, and telling the Speaker of the House that he had paired off; and so refusing to vote. There is no justification for such conduct, and it becomes a facile way for shirking duty, and evading responsibility. If a member is under a necessity to go away the rules of the House require him to ask leave; and the Journals of the early Congresses are full of such applications. If he is compelled to go, it is his misfortune, and should not be communicated to another. This writer had never seen an instance of it in the Senate during his thirty years of service there; but the practice has since penetrated that body; and 'pairing off' has become as common in that House as in the other, in proportion to its numbers, and with an aggravation of the evil, as the absence of a Senator is a loss to his State of half its weight. As a consequence, the two Houses are habitually found voting with deficient numbers — often to the extent of a third — often with a bare quorum." [1]

[1] *Thirty Years' View*, I, 178.

Although so thoroughly established, the practice was still wholly unofficial, as in England. Speaker Blaine in 1871 spoke of it as an "indulgence," a practice that had "grown up without rule," and was tolerated only by unanimous consent. Official recognition of it came with the revision of the rules in 1880. Now it is provided that pairs of which the Clerk has been informed in writing shall be announced after the second roll-call, and published in the "Record" as part of the proceedings, after the names of those not voting. The system is for the most part farcical. A few "live pairs" (where men definitely arrange to offset each other) are above criticism, but the rest of the business is pretense. A member intending to go away, so notifies the pair clerk. In case of a Yea-and-Nay vote the pair clerk, after dividing the names of such absentees into Republican and Democratic lists, offsets the names on the shorter list with an equal number from the longer list and in the "Record" they are printed by twos as paired. The assumption is that every vote is a party vote, and that every absentee if present would vote with the leaders of his party, both of which things are far from true. Therefore the printed list has no real significance.

Pairing is customary in the State Legislatures, but not universal. The rules of both Senate and House in Georgia forbid its recognition; a pair is not to be allowed as an excuse for not voting. In South Dakota also there is a rule against pairing, but so loosely drawn that it cannot amount to much. It has been held in Michigan that pairs are not recognized by the rules and therefore cannot be made. The Massachusetts House got rid of the system in 1910. Up to the year before, the rule had provided that a member might announce a pair, which should be entered in the Journal. It was then decided to require the request of the absent member to be filed in writing. This did not remedy the situation enough, and in 1910 the cure was made effectual by prohibiting pairs except in the case of members absent with a committee by authority of the House. The rules of the Convention of 1917 succinctly declared: "The pairing of members shall not be recognized." A few members accustomed to the legislative practice of a dozen years before, tried to get announcements of pairs received, but in vain. In a few instances leave of absence was granted to two members on the same day, under circumstances looking suspiciously like a private agreement, but there was not enough of that sort of thing to call for notice. On the

whole the spirit of the rule was observed, and in my judgment to great advantage.

The pairing system would have been particularly indefensible in the Massachusetts Convention because that assembly was elected as a non-partisan body, and in fact partisanship did not crop out in its proceedings. On the issue taking the most time, the Initiative and Referendum, there was alignment, for many members had been elected on that issue, but the alignment was not followed on other measures. Pairing for other than definitely expected votes has no excuse whatever unless it is assumed that members will almost invariably vote along party lines. Even then a general pair to cover more than a very brief time exposes the absentee to the throwing of the weight of his vote on the side which if present he would not have chosen. It has been said that not one per cent of the votes of Congress show no deviation from party lines. That is certainly the case in the General Court of Massachusetts, and probably is true of most of the other Legislatures. No man can forsee how he would vote on subsidiary questions, and there are few main questions on which he is justified in making up his mind in advance beyond the possibility of change. Debate takes place for the purpose of aiding decision. If we are to assume that debate has any value at all, it ought to have the chance to influence all whose votes are to follow. Though a paired absentee does not vote, he virtually exercises his power, by a sort of proxy, which quite nullifies the prime object of discussion. The practice ought to be totally abolished everywhere.

If there is any justification in principle for the pairing system, then the logical deduction is that men ought to have permission for the direct recording and counting of their votes in their absence. The arrangement of a pair is an auxiliary process, awkward and useless, that might better be discarded. The straightforward application of the principle, however, would be repugnant to any legislative body, for it would run counter to the basic theories of the parliamentary system. Only under exceptional circumstances have American assemblies ever consented to it. Such were the circumstances when the Declaration of Independence was adopted. Several members not present when the vote was taken were allowed to affix their signatures the next day. In early and rare instances the names of members not present in the National House of Representatives were after-

ward entered in the list of Yeas and Nays, by voted permission.

Proxies give effect to the wishes of absentees and therefore may claim kinship with pairs. In the British House of Lords voting by proxy has been permitted from ancient times. Blackstone explained it to be "a privilege which a member of the other House can by no means have, as he is himself but a proxy for a multitude of other people."[1] The order that no Lord shall have more than two proxies was made in the time of the second Charles because the Duke of Buckingham held no less than fourteen.

Proxy voting was proposed for the American Congress by as wise a man as Benjamin Franklin. He wrote the first sketch of a plan of confederation known to have been presented to Congress, bringing it forward July 21, 1775. Article VIII read: "At every meeting of the Congress, one half of the members returned, exclusive of proxies, shall be necessary to make a quorum; and each delegate at the Congress shall have a vote in all cases, and, if necessarily absent, shall be allowed to appoint any other delegate from the same colony to be his proxy, who may vote for him."[2] The idea did not then appeal, and has never since appealed, to the American fancy.

In the French Chamber, when the voting is by cards deposited in urns carried around by attendants, voting by proxy is both possible and authorized.

Reconsideration

In order to avoid contradictory decisions, to prevent surprise, and to afford opportunity for determining questions as they arise, for centuries it has been the rule of Parliament that no motion shall be made or question proposed which is substantially the same with one on which the judgment of the House has already been expressed in the course of the session. Hatsell quotes (II, 92) a rule of April 2, 1604, "that a question being once made, and carried to the affirmative, cannot be questioned again, but must stand as the judgment of the House." He goes on to cite twenty-six cases illustrating this principle, and comments: "This seems to be a rule that ought to be adhered to as strictly as possible, in order to avoid surprise, and that unfair proceeding which might otherwise be sometime proposed." Nevertheless,

[1] *Commentaries*, I, 168.

[2] *Works of Benjamin Franklin*, John Bigelow, ed., V, 551.

in order that the discretion of Parliament may not be too strictly confined, and its votes be subject to irrevocable error, the House may rescind a vote. Difficulty arises when the vote has been in the negative, for it may be hard in some cases to frame an adequate question without raising the same issue a second time. To avoid this and other difficulties, Americans invented the motion for reconsideration. Cushing says (505, note) that this motion is entirely American in its origin, and one of the few motions known only in our legislative assemblies.

To whom the credit should be given for the device, it is probably impossible to learn. I find proof of its existence before the Revolutionary War, in criticism of the General Court of Massachusetts by Governor Thomas Hutchinson. "The House," he says, "although upon some occasions exceptions are taken to motions and proceedings which come before them as not being in parliamentary form, yet are not strict in conforming to some of the most useful rules of Parliament. A bill or motion is not only referred from one session to another, but a bill, after rejecting upon a second or third reading, is sometimes taken up and passed suddenly the same session. They have an order of the House, that when any affair has been considered, it shall not be brought before the House again the same session, unless there be as full a House as when it was passed upon. This, if observed, would still be liable to inconvenience, as any designing person might take an opportunity upon a change of faces, the number being as great as before, suddenly to carry any point; but even this rule, like many other of what are called standing orders, is too frequently by votes, on particular occasions, dispensed with, which lessens the dignity of the House."[1]

The indications are that the practice had not then become general throughout the colonies. Thomas Jefferson,[2] writing in 1786 to M. de Meusnier, observed that as the first Congress had been composed mostly of men who had been members of Legislatures, it was natural for them to adopt rules to which they had been accustomed; that these were nearly the same in the various Houses through having been copied from the same original, the British Parliament; and that one of them was, "a question once determined cannot be proposed a second time in the same session." Congress during its first session, in the autumn of 1774,

[1] *History of Massachusetts*, 3d ed., II, 394 (1760–67).
[2] *Writings of Jefferson*, P. L. Ford, ed., IV, 149.

observed the rule strictly. Jefferson's explanation of why they then deviated from it suggests what may have been the reason why the practice of reconsideration became familiar in America. "Before their meeting in the Spring," he says, "the war had broken out. They found themselves at the head of that war in an Executive as well as Legislative capacity. They found that a rule, wise and necessary for a legislative body, did not suit an Executive one, which, being governed by events, must change their purposes, as those change. Besides their session was likely then to become of equal duration with the war; and a rule which should render their legislation immutable during all that period could not be submitted to. They therefore renounced it in practice, and have ever since continued to reconsider their questions freely."

Jefferson went on to say: "The only restraint as yet provided against the abuse of this permission to reconsider, is that when a question has been decided, it cannot be proposed for reconsideration but by some one who voted in favor of the former decision, and declares that he has since changed his opinion."

Disregard of this in the very first session of the Senate of the United States led to momentous results. Senator William Maclay came from Western Pennsylvania. He wanted the new capital of the country on the banks of the Susquehanna. Others wanted it on the Delaware or the Potomac. Maclay led a fight that came very near winning. On the 22d of September, 1789, the House of Representatives had by 31 to 17 voted for the Susquehanna. In the Senate Maclay at first carried it, but he was betrayed by his colleague Robert Morris. Maclay begins his diary entry of September 24 with: "This day marked the perfidy of Mr. Morris in the most glaring colors." Morris wanted the site to be at the Falls of the Delaware or at any rate in or near Philadelphia, and he moved to strike out the words, "at some convenient place on the banks of the Susquehanna," leaving a blank to be filled later, but only seven rose for his motion. Then he moved reconsideration, whereupon Maclay made the point of order that it could not be moved by one who had voted in the minority. He says: "Quoted parliamentary practice and appealed to the chair. Mr. Adams now made one of his speeches. Unfortunately, it seems that none of our rules reached the point. New matter had been alleged in argument, etc. It was in vain that I alleged that no business could have a decision if minority

members were permitted to move reconsideration under every pretense of new argument. Adams gave it against me." And so the capital of the United States did not go to the banks of the Susquehanna River, all because of John Adams's ruling on a point of parliamentary law. In the following February, however, he reversed his position, and (to use Maclay's quotation in comment), *mirabile dictu* sustained Maclay's similar point of order in another matter.

In the House of Representatives the practice quickly became established, even before any rule was framed on the subject, and it there prevails to this day. It has been ruled, however, that where the Yeas and Nays have not been recorded in the Journal, any member, irrespective of whether he voted with the majority or not, may make the motion to reconsider. Likewise (in 1897) a member of the minority of the Pennsylvania House having moved a reconsideration, when it was later averred that since this was irregular and contrary to rule, the motion should be stricken from the Journal and the action considered as not having been taken, the Chair decided against the point of order, as there was no record of the original vote by the member moving reconsideration. In Congress it has been ruled that a member who was absent, or who was paired in favor of the majority contention, may not make the motion. In the Senate, August 11, 1856, when a salary amendment had been disagreed to on a tie vote, the President *pro tempore* (Mr. Bright) submitted the question of whether it was competent for Mr. Reid, who had voted in the negative and minority, to move reconsideration, and by 17 to 16 it was determined in the affirmative.

There was much debate on the subject in the Massachusetts Convention of 1820. It was objected that if reconsideration must be moved by one who voted in the minority, this would preclude any one who was absent, or did not vote, from the right of moving a reconsideration; that it might be unpleasant for a member in the minority, to be under the necessity of supplicating one in the majority to make a motion for him; that it was impossible to tell who did vote in the majority, when the vote was not by Yeas and Nays; that the Convention, being formed of a single body, lacked the checks that were furnished in most legislative bodies, composed of two Houses and subject to the negative of the executive, and consequently required more ample provision for securing the right of repeated deliberation. Mr.

Foster of Littleton stated a case that had happened in the Legislature ten or twelve years before. An important measure, he said, was advocated by one person only. When the question was taken, it was determined in the negative by the vote of the Speaker. A reconsideration was moved and voted for by the same person only. The Speaker's vote again determined the question in the negative. The measure was brought forward a third time, and carried by about two thirds, "and has been since very well approved of." He concluded by saying that the rule was inapplicable to a body like the Convention, where a thing once done was done forever. Daniel Webster believed that the motion should be made by some one who voted in the majority; this might not be an absolute security against surprise and other evil consequences, but it was the best security, and it was familiar to many gentlemen, and to the practice of many assemblies.

Mr. Webster threw light on the whole question. The practice of reconsidering votes in a legislative assembly, he said, was of recent origin. The general rule had been, and still was, that no proposition could be brought forward directly contradicting what had been done at the same session. Mr. Jefferson calls the whole practice an anomalous proceeding; and a proceeding tending to produce effects by surprise. It was indeed a practice by which the House put more power into the hands of every individual member than it could itself exercise by the greatest majority. The House bound itself by rules not to give a second reading, or take a second important vote on the same measure, the same day. But by this practice it was in the power of any individual member to do that which the whole House could not do; and to bring on a second discussion, and a second vote, the same day or hour.

Joseph B. Varnum, who had been Speaker of the National House of Representatives four years and afterward United States Senator, said that in his many years of experience with the rule proposed by Mr. Webster, he had never heard any member of Congress make objection to it; that the honor of gentlemen stating that they had voted in the majority had always been relied on, and that no inconvenience had resulted from such reliance. And Josiah Quincy said he had observed the favorable operation of the rule for eight years in Congress, without having experienced the least inconvenience, though he was the whole of

that time in a minority. The rule was adopted for the Convention.[1]

In the next Convention, on the contrary, the practice was rejected. Henry Wilson, afterward Vice-President, moved to strike out from the proposed rules the proviso that a motion to reconsider should come from one who had voted in the majority, and his motion prevailed. It has now long been the custom in the Massachusetts General Court to let anybody make the motion. No harm whatever is observable as a result. Few of the other States have yet abandoned the useless complexity of the old rule. The rules of at least forty Legislatures still compel securing the same result awkwardly by indirection. In the Alabama Senate a member of the minority may move, except that, on questions calling for a two-thirds vote, the motion must be made by somebody who had voted on the prevailing side. Georgia and Michigan Legislatures specify that any member may make the motion.

The easy method of evading the spirit of the old rule appeared in the Massachusetts Convention of 1820 and aroused criticism. Josiah Quincy stated that he had voted in the majority on a question just taken, that he might be in order to move a reconsideration. Asked whether it was a fair construction of the rule to vote in opposition to his opinion for the express purpose of giving him a right to call for the question again, he said it certainly was, and that it was every day's practice, and for the reason that the gentleman who had made the original motion had a right to be heard in support of it; but when he had waived that right and any gentleman perceived that for want of explanation, the motion was likely to be lost, it was perfectly right and common practice for him to give his vote against the motion, that he might be in order to move a reconsideration, and to state the reasons for the motion.[2]

In Congress, and doubtless commonly where the old rule prevails, when it is seen before the announcing of the vote what the result is to be, one of those voting with the minority changes his vote so that he appears of record as of the majority and can move to reconsider.

Of the ten very brief rules that the second Provincial Congress of Massachusetts found enough for its needs, one was: "No vote

[1] *Mass. Convention of 1820*, 18–20, and 35–47.
[2] *Ibid.*, 207.

shall be reconsidered when a less number is present in Congress than there was when it passed." This point, too, was discussed in the Convention of 1820, the draft of the rule submitted requiring that a motion to reconsider should lie on the table one day, and then should not be taken up unless as many members were present as had been present when the vote in question had been passed. Against this it was urged that the attendance would decrease from day to day; that it would be in the power of men opposed to reconsideration to stay away and prevent it; that there was not a single instance of a rule like it in any legislative assembly; that a measure might pass in a full House by one vote, and though members might change their opinions, yet if one man absented himself, reconsideration could not prevail, so that a single member might defeat the will of the whole House.

The charge of lack of precedent was refuted by the reading of a similar rule put in force in the Massachusetts Provincial Assembly of 1768, and Lemuel Shaw, who later won high reputation as a jurist when long Chief Justice of the Supreme Court, said, "it has never yet been the practice of the Legislature of this Commonwealth to permit a smaller number to reverse the acts and votes of a larger." In the matter of waning attendance he trusted that "no consideration short of imperious necessity would induce a gentleman to withdraw the aid of his voice and counsel from this Convention until the very interesting and important trust confided to them by their constituents had been fully and definitively discharged." Daniel Webster thought this feature of the rule most extraordinary, and in many respects objectionable. It was rejected.

In that same year Congress furnished a notable instance of the questionable use to which may be put restrictions on the time for moving to reconsider. By a trick rarely equaled in parliamentary procedure, Henry Clay saved his Missouri Compromise, or at any rate guarded it from danger. The bill had passed the House March 2. On the morning of the 3d, John Randolph, having voted with the majority, moved reconsideration. Clay, as Speaker, ruled the motion out of order "until the ordinary business of the morning, as prescribed by the rules of the House, should be disposed of." When at last that business was out of the way and Randolph renewed his motion, Clay informed him the bill had gone to the Senate. The fact was that the Clerk had hurried the bill to the Senate while Clay was ruling Randolph's

motions out of order. It is not surprising that this helped to inflame the quarrel in which the Compromise involved the two men, developing into the bitterest enmity and almost costing Randolph his life. The practice of the House was later changed so as to allow the motion to reconsider to be made at any moment within the prescribed time.

Another of Clay's Compromises, that of 1850, furnished in this same connection a notable instance of the creation of parliamentary law under partisan pressure. Clay proposed that a boundary line between Texas and New Mexico should be fixed, giving to Texas but little of the New Mexican territory she claimed, but granting her a certain sum of money for the payment of that part of her public debt for which, during her independent existence, her customs revenue had been pledged. The bill created a great stir in the House. As the prospect of such legislation with a grant of money in it grew brighter, Texas scrip rose in the market. About the middle of June it had gone up from ten per cent to fifty. In case the bill passed, the scrip was not unlikely to rise to par. A large and active lobby gathered at Washington. It was currently reported that millions of Texas securities were in the hands of members of Congress and officers of the Government, high and low. The bill was referred to the Committee of the Whole by a majority of two votes. Its fate looked doubtful. The third reading was refused by a majority of forty-six. Defeat seemed certain. A reconsideration was moved, pending which the House adjourned.

The next day the reconsideration was carried by a majority of fifty-six. An amendment to the reconsidered bill was then adopted. But again the House refused the third reading, this time by a majority of eight. Again a reconsideration was moved. It had for years been the rule that a motion could not be twice reconsidered. Did it make any difference that after the bill had been once reconsidered, it had been amended? Some argued that this made it a new measure, capable in its turn of reconsideration. Speaker Howell Cobb thought otherwise, and ruled against it. On appeal his decision was overthrown by a majority of thirty-eight. "The floor of the House was swarming with lobby agents, and amid boisterous demonstrations of delight the third reading was ordered by a majority of ten, and the bill then passed. The House had never presented a more repugnant and alarming spectacle. But the Speaker, at least, had done his duty

and kept his hands clean. Texas scrip rushed up to par."[1]

And Hinds's Precedents to-day gives the rule: "A motion to reconsider having been once made and decided, may not be repeated unless an amendment has been adopted since the first reconsideration."

The question again became important in the course of the struggle over ratifying the Woman Suffrage Amendment. The West Virginia Senate voted against the amendment twice — on the original motion and on the motion to reconsider. Afterward by the expulsion of one Senator and by permitting another to vote although he had removed from the State, as it was charged, a majority was secured in favor of the amendment, the previous action was reconsidered, and ratification prevailed. That this was done without changing the rule against a second reconsideration (which would have required a two-thirds vote), was announced as one of the grounds for carrying the matter up to the Supreme Court.

Reconsideration played a part in the hot fight over the same issue in Tennessee. There the House voted to ratify by 49 to 47, whereupon the Speaker changed his vote to the majority so that he might be in position to move reconsideration, which in due course he did, but he failed to bring up his motion within the two days allowed, evidently because he did not have a majority at command. After that anybody could bring up the motion, and so on the following day the suffrage leader called up the matter, only to find that no quorum could be mustered, twenty-five of the opposition having hurried across the State line to Decatur, Alabama. The Tennessee Constitution calls for a two-thirds quorum. With more than half the members present, though not two thirds, could there be valid action on the motion to reconsider? The suffrage leader argued that there could be inasmuch as this was a Federal matter. Whether the contention was sound or not proved to be of no consequence. After the motion to reconsider had been defeated, the Senate having ratified, upon certification from the legislative officials the Governor in turn certified to the Secretary of State at Washington, who proceeded on the assumption that the certification was valid. This assumption was approved by the Supreme Court of the United States in Leser *et al. v.* Garnett *et al.*, February 27, 1922. Courts have generally refused to upset such proceedings unless the legislative

[1] Carl Schurz, *Henry Clay*, II, 363.

Journals show violation of constitutional provision or statute in some essential particular. The violations here alleged involved legislative rules regarding reconsideration and certification. Courts do not concern themselves with whether a Legislature observes its own rules.

The same amendment had in Congress brought up another phase of the subject. There a proposal to submit a constitutional amendment must get a two-thirds vote in order to prevail. Can such a vote be reconsidered by less than a two-thirds vote? The question confronted Vice-President Marshall in relation to the Woman Suffrage Amendment, October 3, 1918, and he gave it as his opinion that the motion to reconsider is a mere subsidiary motion, plainly covered by the Senate rule that every motion to reconsider shall be decided by a majority vote. Precedents in the House are to the same effect.

The man who goes to Congress from a State Legislature where the power to reconsider is exercised and prized, finds himself distressed by its subversion in the National House. There the passage of a bill is nowadays invariably followed by a motion to reconsider, coupled with a motion to table the motion to reconsider, and as the majority that voted for the passage of the bill can at once table the motion to reconsider, the matter is then and there clinched, for the House never takes such a motion off the table. The same process is permissible in the Senate, but is rarely used. The practice in the State Legislatures varies. In the Michigan Senate, for example, tabling the motion to reconsider is frequently made for the sole purpose of ending a matter, but in the House there is by rule specific provision for taking from the table a motion to reconsider. In Connecticut there was attempt to copy the congressional custom in 1861, but it failed, the belief being that it was inconsistent with the commendable purpose of the rule permitting reconsideration within two days, and that it would enable a temporary majority to obtain an unfair advantage.

Mississippi put into her Constitution of 1890 the requirement that "all votes on the final passage of any measure shall be subject to reconsideration for at least one whole legislative day, and no motion to reconsider such vote shall be disposed of adversely on the day on which the original vote was taken, except on the last day of the session." Whether or not the evil at which this was aimed should be dignified by constitutional provision, there

can be little question that it ought somehow to be met. In altogether too many assemblies it is permitted to move reconsideration immediately after a vote has been taken, with the avowed hope that the motion will not prevail, or as in Congress to make the motion and then move to lay it on the table. This foils the legitimate and admirable purpose of reconsideration, which is properly to be secured by giving the assembly a night to "sleep on it." Votes are sometimes carried by the influences of passion or excitement that pass away after a few hours, and the calmer deliberations of the next morning may produce wiser results. Furthermore, if the decision has been reached in a small house and if the matter is of real consequence, a full attendance may be secured at the following session, and that generally conduces to better lawmaking. For this reason I seriously question the wisdom of the provision Missouri put into her Constitution of 1875, requiring that when a bill is put upon its final passage and fails, a vote upon a motion to reconsider shall be immediately taken and the subject finally disposed of before the House proceeds to any other business.

On the other hand, matters ought not to be allowed to hang along. Because of this the rule of the Iowa Senate, for example, appears insufficient to one accustomed to Massachusetts practice. The Iowa rule reads: "When a motion or question has been decided, any member having voted on the prevailing side may move a reconsideration on the same or the next legislative day." That of the Massachusetts Senate provides for the motion on the same or the next day, and then goes on: "If reconsideration is moved on the same day, the motion shall be placed first in the Orders of the Day for the succeeding day; but if it is moved on the succeeding day, the motion shall be considered forthwith." The result in Iowa, according to its "Legislative Manual," is that "motions to reconsider are often filed instead of being offered from the floor," the purpose being to record the motion within the time prescribed "so that it can be called up at a later date, after the matter can be canvassed with certain members or when members who were present may be absent." In Massachusetts the issue must be met at once, everybody has notice of it or at least knows there is no occasion to be on guard more than twenty-four hours, a conclusion is reached, business marches. To be sure, a motion to reconsider can be tabled, but that must be by essentially the same voting part of the membership that has

just passed upon the proposal, making trickery difficult. No one man and no few men can compel a substantial majority to be kept in suspense against its will.

Massachusetts does not wholly close the door against some measure of surprise, for it does not require the motion necessarily to be made on the same day, and an inexperienced member may forget that it may be made the next morning. The Wisconsin Senate has guarded against this by a change in its rules made in 1911 so that when reconsideration is moved on the day after action, the motion shall be laid over to the next calendar on the request of any five members who voted in the majority. Another method of protection is given by the California rule that for reconsideration to prevail, it must have the vote of a majority of all members elected.

The requirement of time for reconsideration became of importance in the case of State *v.* New London Savings Bank, 79 Conn. 141 (1906). A bill that had passed both Houses was without authority sent to the Governor while it was supposed to be held pending a motion to reconsider. The Governor signed the bill. Did it become law? The court said it did not. On the other hand, in West Virginia when a bill that had passed House and Senate was sent back to the House before the expiration of the two days that the Senate rule allowed for reconsideration, and the House refused the request of the Senate for the return of the bill, the attempt of the Senate to reconsider without possession of the papers was a nullity.[1]

When George N. Briggs, who had sat in six Congresses and been Governor seven years, told the Massachusetts Convention of 1853 that in his judgment the evil producing long sessions was to be found in the mode of transacting business in the Legislature, he particularly blamed, not the consideration, but the reconsideration, of subjects. The Clerk of the last House had informed him that motions to reconsider would average about one a day, and the reason he found in the hasty departure of many members for their homes before the business of an afternoon had been finished. Those who remained passed measures the others sought to reconsider the next day.[2] It is still the case that in Massachusetts, as probably in all other States, motions to reconsider cost a good deal of time. In the Massachusetts House the

[1] Osburn *v.* Staley, 5 W.Va. 85 (1911).
[2] *Debates of Mass. Conv. of 1853*, I, 961.

harm has been lessened by restricting debate on such motions to thirty minutes. Though there is yet much of what seems a waste of time, on the whole the opportunity to reconsider is worth while. As long as second thought often proves best, so long will it be prudent, in the grave and solemn matter of making law, to ensure ample yet reasonable opportunity for wiser conclusion.

In essence there is no difference between reconsideration and reintroduction, but we are wont to view somewhat differently a second considering of a matter that so closely follows the first as to be in effect a part of it, and one coming after many days. Recalling Governor Hutchinson's complaint, it will be seen that our fathers were not at first convinced of any great harm in letting proposals come up a second time. Indeed, this was provided for definitely, though by negation, in the South Carolina Constitution from 1790 until the Civil War, the provision reading: "No bill or ordinance which shall have been rejected by either House shall be brought in again during the sitting, without leave of the House, and notice of six days being previously given."

Georgia in 1798 stipulated: "No bill or ordinance which shall have been rejected by either House shall be brought in again during the session, under the same or any other title, without the consent of two thirds of each branch." In 1865 this was changed to limit the need of such consent to the House by which the measure was rejected. In that form the provision survives. Louisiana in 1879 put into her Constitution the harmless provision that no measure once rejected should be proposed again in the same House without the consent of a majority thereof. In Montana, by rule, a rejected measure can be introduced again after five days and upon a two-thirds vote; in Wyoming, after three days on majority vote. By a joint rule of the General Assembly of Iowa it appears that when a bill has passed one House and been rejected by the other, upon five days' notice it can again be introduced in either House upon leave of a majority of the members of that House. The rule is rarely used. Tennessee and Texas have from the start provided in their Constitutions that after a bill has been once rejected, no bill containing the same substance shall be passed into law during the same session. Elsewhere the securing of the same end has been left to legislative rules, and wisely, for it is not an appropriate matter to treat in the fundamental law.

CHAPTER XVII

RELATIONS BETWEEN THE BRANCHES

The theory of the bicameral system assumes two Houses of equal power. This it has proved as hard to get as it is to maintain the equilibrium between gold and silver in bimetallic currencies. In our colonial days the lower branch was the more important. The makers of the first Constitutions seem for the most part to have expected that this would continue to be the case. Quickly, however, the checks-and-balances idea came to the front, and by the time Massachusetts got around to devising a Frame of Government, it was generally accepted that the two Houses should stand on a level. When the authors of the Federal Constitution adopted the principle, they threw the adjustment out of balance by giving to the Senate powers destined to make that body distinctly the more influential in lawmaking.

In the States, too, the Senates usually have the greater share in determining the laws, but not so much in the way of shaping new legislation as in preventing change. Conditions tend to make the lower House the constructive body, the upper House the obstructive body. This, however, is no part of the bicameral theory. Sir Thomas Smith, who described Parliament in a book written nearly three centuries and a half ago, said: "In the lower House the Speaker, sitting in a seat or chair for that purpose somewhat higher that he may see and be seen of them all, hath before him, in a lower seat, his clerk who readeth such bills as be first propounded in the lower House, or be sent down from the Lords. For in that point each House has equal authority to propound what they think meet, either for the abrogating of some law made before, or for making of a new." It is still the case with Parliament, as it is now with all the legislative bodies of the United States, that theoretically the two Houses stand on the same footing in the matter of proposal, with no important exception save in respect of money bills.

The few deviations from this principle have not won favor. Locke's Fundamental Constitutions of Carolina said, in 1669: "The grand council shall prepare all matters to be proposed in parliament. Nor shall any matter whatsoever be proposed in

parliament, but what has first passed the grand council." A dozen years later certain Scotch Presbyterians thought of removing to Carolina in order to escape from persecution, and for their encouragement some changes were made in the frame of government. One read (1682): "And whereas it is not impossible that even the Grand Councill or Senate of Carolina, that we have taken such good care to have equally constituted for the good & quiet of the inhabitants of Carolina, may become corrupt & forgett their duty, & not take sufficient care to remedy inconveniences by proposing fitting Laws to be passed by the Parliament, wee have thought fitt to appoint that if the major part of the grand Juryes of the Countyes shall present a thing necessary to be passed into a law, & that if the Grand Councill do not in convenient time propose it to the Parliament, that then it shall be lawfull for any one of the chambers to take cognizance of it, & propose it to the house." Later the Assembly denied the right of the Council to initiate, and a long deadlock followed.

It is not improbable that Locke's notion suggested to William Penn the provision he put into the Charter of Liberties for Pennsylvania in 1682. By it the Governor and Provincial Council (an elected upper branch) were to prepare and propose all bills. These were to be "publisht and Affixed to the most noted places in the inhabited parts [of the Province] Thirty days before the meeting of the General Assembly in order to the passing of them into laws or Rejecting of them as the General Assembly shall see meet." In 1696 the power to originate was given to the Assembly.

In Virginia under Culpeper the Governor and Council were to suggest measures to the home Government. After inspection, and amendment if thought necessary, these were to be sent back and then passed upon by the House. Culpeper soon found this would not work, and so informed the home authorities. By the practice that came to be established, the Council had power to concur, amend, or reject, but not to originate. Accustomed to such a program, the framers of the Constitution of 1776 naturally provided: "All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be amended, with consent of the House of Delegates; except money bills, which in no instance shall be altered by the Senate, but wholly approved or rejected." Although the prohibition against money bills was omitted in the Constitution of 1830, it was not

until 1850 that the upper branch got the right to originate measures. There the Senate seems to have been at first of less consequence than anywhere else. Said George Nicholas in the Virginia Convention, June 4, 1788: "The members of our Senate have never ventured to oppose any measure of the House of Deputies; and if they had, their chance of being reëlected, when opposed by the delegates of the different counties, would be small." [1] Such subserviency in any other State has not come to my notice.

With us it is natural that much the larger part of the bills should start in the lower House because it always has many more members to conceive legislative needs or be asked to present them. Where government by Ministers prevails, the lower House is usually the center of activity. Government bills will be there introduced and the sponsors for others will usually prefer the same course. The common result is a dearth of business in the upper branch in the first part of a session, with an excess of business toward the close. Frequent complaints on this score in England have led to suggestion that some of the important bills be introduced in the House of Lords, but the Government of the day, whichever party is in power, does not show much inclination to adopt the suggestion. Ilbert [2] tells us the reason probably is that until a measure has been discussed in the popular House, it is difficult to ascertain the trend and force of public opinion, what chance the measure has of becoming law, and what amendments it is likely to require in deference to hostile or friendly criticism.

Ordinary bills seldom originate in the French Senate. On the other hand, in Germany before the World War, though the right of beginning legislation was expressly conferred upon the lower chamber, the Reichstag, in practice it was exercised almost exclusively by the upper chamber, the Bundesrath, even in the matter of money bills. Usually bills were prepared, discussed, and voted in the Bundesrath, and then submitted to the Reichstag, which criticized and amended rather freely. Members of the Bundesrath might sit and vote in the Reichstag, so that they had a double chance at a measure if they wished, indeed a triple chance, for measures had to be returned for further scrutiny by the Bundesrath before promulgation by the Emperor. In any case, the final approval of a measure had to take place in the

[1] *Elliot's Debates*, III, 18. [2] *Parliament*, 203.

Bundesrath, by whose authority alone the character of law could be imparted. Speaking strictly, it was the Bundesrath that made law, with merely the assent of the Reichstag.[1]

This was reversed by the Constitution of July 31, 1919. Thenceforward, it was explicitly declared, national laws were to be enacted by the National Assembly, the new Reichstag, the lower branch. If the upper branch wishes to propose a law, it must communicate with the lower through the Cabinet, which must send down the bill with a statement of its attitude. On the other hand, if the Cabinet wishes to propose a law, it must consult the upper branch, and if that body dissents, a statement to that effect must accompany the bill when laid before the lower branch by the Cabinet. In matter of passage of bills, the upper branch has no more than the power of suspensive veto. Within two weeks after the Assembly sends up a law, the upper branch (the National Council or Reichsrath) may object, and then it has two weeks more for filing its objection with the Cabinet, which returns the measure to the lower branch for reconsideration. Then if the two branches cannot agree, the President may within three months refer the matter to the people. If the President makes no use of this right, the law does not go into effect unless the lower branch by a two-thirds vote disapproves the objections of the upper, in which case the President must either promulgate the law as enacted by the Assembly or refer it to the people.

In the Netherlands the lower House of the States-General takes the initiative in presenting projects of law to the King. On sending a measure to the upper House, it is authorized by the Constitution to entrust one or more of its members with the defense of its measures there.

Variations of practice found in other legislative bodies indicate it is not yet clear what course will get the most efficiency. That something better will be worked out is altogether probable. Governor Dunne of Illinois told the Governors' Conference of 1913 that he would have an upper House of fifteen or twenty-five members, and that he would have it meet sixty days before the lower House should be convened. He would by law compel every bill to be submitted to such an upper House during that sixty days, and he would permit the lower House to initiate no measures except such as relate to the fiscal department of the State.[2] Whether or not the remedy for palpable evils lies in this

[1] F. A. Ogg, *The Governments of Europe*, 221. [2] *Proceedings*, 272.

direction, it can hardly be questioned that the need of some remedy is serious, at any rate where no joint-committee system links together the Houses and secures some harmony of action.

The need is particularly conspicuous in Congress, where there is enormous waste of time and energy by reason of methods that fail to secure action by the second House on measures that have passed the first. It frequently happens that meritorious bills will receive the general approval of one House or the other, session after session, but will not be lucky enough to get the consideration of both Houses in the same session. This clogs the machinery of Congress in costly and needless fashion. The waste would be greatly lessened by the adoption of the joint-committee system as it is worked, for example, in Massachusetts, avoiding more than one committee consideration of any bills save those involving expenditure. If separate committees must be maintained, then upon reference in the second branch, reports within a specified time might well be required by rule, for two equally thorough committee inquiries are hardly essential. It has been suggested that if in the second branch all bills favorably reported by committees after coming from the first branch should have the right of way until disposed of, a great deal of work now allowed to encumber calendars would be finished speedily and to general advantage.

In Parliament and in other bodies where one branch is markedly the stronger, comparatively few measures accepted by one House are rejected by the other. Where the two Houses are on equal footing as with us, it is much more common for bills to be killed in the second chamber, but as the bicameral system is meant to accomplish this very thing, the assumption being that such bills meet a merited fate, the result is at least not *prima facie* evidence of inefficiency, but quite the contrary.

Conference Committees

The usual machinery for reconciling differences of opinion between the two Houses when each wishes action, but they disagree as to details, is the committee of conference. It is a very old method of procedure, indeed coeval with the beginnings of Parliament. No record exists of a conference before 1370, but it is clear that the one then held was not the first, for in 1378 we find the Lords refusing the request of the Commons that six Lords may be allowed to advise them on the question of supply as had

been done in the last three Parliaments, but agreeing to a conference of from six to ten of each House, "as by ancient custom." [1]

Two kinds of conference developed. One was the formal or simple conference, producing an exchange of written reasons, sometimes resulting in agreement, but often meant only to justify the position taken. No conference of this sort has been asked in Parliament since 1857, messages between the Houses now accomplishing the purpose. The other variety was the free conference, in which, as the adjective implies, discussion was allowed, and the real intent was to bring the two Houses to one mind. This, too, has now disappeared from the procedure of Parliament, the last conference of the sort having been held in 1836. The practice fell into disuse because the development of the cabinet system of government brought it to pass that almost all important bills were government bills, over which negotiations came to be carried on between the Ministry and the leading peers in opposition.

The first recorded request in Massachusetts for a conference came through a singular occasion. The Journal of June 16, 1644, has this entry: "The Howse of Deputies, upon much serious debate, dissent from our honoured magistrates in ye bill sent from them for ye giving, or which seemes to give them, or any of them, power to licence any commanders of any vessells to make a fight in our harbours, & therefore desire a conference with them for a more speedy issue herein." [2] The conference appears to have been speedily held, and the upper House appears to have yielded, for on the same day is the record of a vote that no ships within the harbor should be suffered to fight with any others.[3]

When in 1703 the Legislature of New Jersey, in conformity with the practice of Parliament, demanded of the Governor, Lord Cornbury, sundry specified privileges of assemblies, he rejected, as an innovation, this one: "That if any misunderstanding shall happen to arise between the Council and this House, that in such a case a committee of the Council may be appointed to confer with a committee of this House for adjusting and reconciling all such differences." Nevertheless the privilege was repeatedly exercised. Conferences sometimes lasted several days.

[1] Adrian Wontner, *The Lords, Their History and Powers*, 37.
[2] *Records of the Colony of the Mass. Bay in N.E.*, III, 16.
[3] *Ibid.*, 17.

The House prevailed on matters of principle by threatening to block all legislation if it could not have its way, but it was not obstinate about unimportant amendments made by the Council.

The Constitution drafted for New York by John Jay in 1777 provided for a conference committee, to be elected by ballot, whenever Senate and House should disagree. Absurdly enough, it was required that the conference should be held "in the presence of both" Houses. Such a conference must have been as entertaining as any other passage-at-arms. Martin Van Buren took part in several conferences when in 1812 he was serving his first term in the New York Senate. In his "Autobiography" [1] he describes how the opposing views were set forth "in the presence of multitudes of the People." The feelings of the members, as also of the audience, frequently became highly excited. At the close of one of Van Buren's speeches Judge Hager, "an honest German and Republican Senator," stepped forward, embraced and kissed Van Buren, and thanked him in the presence of the two Houses. Van Buren says that, although these debates in no instance changed a vote in either House, "they exerted a very salutary influence upon the public mind." Chancellor Kent and Rufus King, zealous Federalists, doubtless saw nothing salutary in the influence Van Buren extolled, but there is no reason to think they were prejudiced in telling the Convention of 1821 that conferences as then directed were calculated only to produce collisions, to array the two Houses more and more against each other, and to confirm them respectively in their preconceived opinions. Delegate Sharpe said experience had shown the conferences to be useless and a mere legislative farce. Wisely the Convention dropped the provision. Nowadays the New York Legislature resorts to conference committees very infrequently. Most of the disagreements are adjusted by the leaders informally.

Louisiana in 1879 stipulated that reports of committees of conference should be adopted only by a majority of the members elected to each House, with the vote taken by Yeas and Nays. That such formal recognition of the dangers of conference committees has not become general in State Constitutions is in some degree proof that these dangers are not alarmingly prevalent in State Legislatures. Professor Reinsch does not flatter with the explanation he gives. In his opinion the cardinal weakness of the

[1] Am. Hist. Assn., *Annual Report*, 1920, II, 44.

Legislatures of our Commonwealths lies rather in their careless habit of indiscriminating assent to the larger part of the measures presented to them, than in any tendency to obstinate disagreement between rival chambers. "The habit of unanimous consent has fastened itself so strongly upon many of our State Legislatures, that the arbitral function of the conference chamber is resorted to only upon rare occasions. The general weakness of the party system in our local lawmaking bodies, combined with the usual tacit understanding between the opposing machines, as well as the infrequence of opposing control in the two Houses in the present day of sectional majorities, assure the flood of legislation a passage free from the friction which necessitates in Congress the compromising agency of the Committee of Conference." [1]

Although much of this might be contested, it is here quoted only to illustrate the dangers of generalization in such a matter as the one at the moment under consideration. Certainly in Massachusetts, and in my belief in sundry other States, there is no indiscriminating assent to the larger part of the measures, no habit of unanimous consent, no tacit understanding between opposing machines. The emphasis would better have been laid on the infrequence of control of the two branches by different parties. To this, in States using the joint-committee system, should be added the advantage of that system in getting some degree of compromise before bills are reported. Then, too, in the States there is usually not so much hostility between the two branches as there is in Washington. The State Senates have not the *esprit de corps* found in the Federal Senate. They are weaker bodies, less jealous of prerogatives, less insistent and less dogmatic.

It is in Congress that the conference committee has developed its worst aspects. They grew serious about a generation ago, if we may rely on a speech by John Sherman in the House May 13, 1884. "We have by our practice heretofore gradually extended the powers of Committee of Conference," he said, "until now a proposition to send a bill to a committee of conference startles me when I remember what occurred in the Committee of Conference on the tariff bill last year. I feel that both Houses ought to make a stand on the attempt to transfer the entire legislative power of Congress to a committee of three of each body, selected

[1] Reinsch, *American Legislatures*, 179.

not according to any fixed rule, but selected probably according to the favor of the presiding officer or the chairman of the committee that framed the bill; so that in fact a committee selected by two men, one in each House, may frame and pass the most important legislation of Congress." In spite of Sherman's warning, no such stand was made and the practice continues virtually to vest much of the decision of important issues in a very few men.

Their power lies chiefly in the fact that reports of conference committees must be accepted without amendment or else rejected *in toto*. The impulse is to get done with the matter and so the motion to accept has undue advantage, for some members are sure to prefer swallowing unpalatable provisions rather than prolong controversy. This is the more likely if the report comes in the rush of business toward the end of a session, when to seek further conference might result in the loss of the measure altogether. At any time in the session there is some risk of such a result following the rejection of a conference report, for it may not be possible to secure a second conference, or delay may give opposition to the main proposal chance to develop more strength.

What ought to be the universally accepted parliamentary law would much safeguard the situation, but unfortunately the Senate, save in the matter of the general appropriation bills, still follows the rule in Jefferson's "Manual," taken from the practice of Parliament, to the effect that an amendment need not be germane to the subject-matter of the bill. So when the House sends over other than a general appropriation bill, the Senate may by riders or otherwise amend as it sees fit. Indeed, it may replace with a wholly new measure everything except the title. When the changes, whether of detail or going to the essence, reach the House, it is no longer the custom in the case of big bills to discuss the new proposals one by one, and decide what shall be approved, what rejected. Commonly the bill is at once sent to conference, without instructions. Still excepting the appropriation bills, when this is done the House gets no chance whatever to pass judgment separately on the Senate changes before the conference. Blindfolded the House puts its interests in the hands of its conferees. When their report comes in, praise or blame of any one feature of their judgment is useless except as far as it may contribute toward acceptance or rejection of their conclusion as a whole. The practical effect is that none but a few mem-

bers of the House have ordinarily had any real part in shaping or making so much of the law as results from the Senate proposals in question. For example, when in 1921 more than eight hundred changes were made in the Revenue Bill after it left the House, that body was permitted to pass judgment on but one. To be sure, most of the changes were in matters of detail, with little chance for dispute, but some involved principles of more or less importance.

Entangled in a network of rule and custom, the Representative who resents and would resist this theft of his rights, finds himself helpless. Rarely can he vote, rarely can he voice his mind, in the matter of any fraction of the bill. Usually he cannot even record himself as protesting against some one feature while accepting the measure as a whole. Worst of all, he cannot by argument or suggested change, try to improve what the other branch has done.

This means more than the subversion of individual rights. It means to a degree the abandonment of whatever advantage the bicameral system may have. By so much it in effect transfers the lawmaking power to a small group of members who work out in private a decision that almost always prevails. What is worse, these men are not chosen in a way to ensure the wisest choice. It has become the practice to name as conferees the ranking members of the committee, so that the accident of seniority determines. Exceptions are made, but in general it is not a question of who are most competent to serve. Chance governs, sometimes giving way to favor, rarely to merit.

In the past, conference committees of Congress have added to their dangers by trying to inject wholly new matter into their reports. The House, with its hostility to amendments not germane, sought to prevent this by ruling out such matter on points of order. The Senate was long indifferent, presiding officers ruling that it was for the Senate itself to decide whether it would accept or reject. Not until 1918 was the practice reformed, by a rule forbidding conferees to insert in a report any matter not committed to them by either House. This met an evil, but also it shut the door against an advantage. If a conference committee discovers opportunity for bettering a bill in some matter of detail, in my judgment it might safely and wisely be permitted to call the facts to notice by separate recommendations. This would not impair the valid purpose of the rule, which is to pre-

vent conferees from making innovations that might not be noticed, and in any case might be carried through unfortunately by the impetus of the report as a whole.

In the matter of the general appropriation bills, which make up a large part of the work of Congress, it was hoped that the change of the House rules in 1920 would carry the reform of the conferring process to a point where its more important evils would disappear. The chief dangers aimed at sprang from the power of Senate committees to report increase of appropriations in a bill as it came from the House, or to add new items, and from the power of the Senate itself to do these things if provided for by existing law, as well as to saddle special, private, or local legislation on a general appropriation bill, prohibition extending only to general legislation thereon. This permitted the Senate to embarrass the House conferees with many proposals that the House either had never considered or had rejected. The practical effect was that in either case the conferees on the part of the House commonly exercised the whole legislative power of that body when they yielded to the Senate and made a report of agreement, for such a report was almost sure to be accepted. To meet the situation and as part of the budget reform, the House directed that without its specific authority its managers of a conference shall not agree to any amendment providing for an expenditure not previously authorized by law (unless in continuation of works in progress), or changing existing law (except in the way of retrenchment). This permits, if any member of the House so desires, a separate discussion of anything the Senate has done that is obnoxious to the House rules, and independent acceptance or rejection by the House.

In State Legislatures under machine control, it is said that the leaders resort to the conference committee as a device for the easy exercise of their power. They are supposed to arrange that the reports of the committees in the two Houses shall conflict, resulting in a conference committee that can be managed. This method of manipulation is not impossible, but I much doubt if stratagem of the kind is often deliberately planned. It involves too many factors. Not nearly so often as the public is led to imagine do political leaders conceive intricate programs of chicanery. The men who control Legislatures are usually opportunists, quick and skillful in taking advantage of situations as they arise. The conference committee gives them opportunity, but

seldom one that is premeditated. Nothing like deliberate design in this field has ever come under my observation, either in a Legislature or in Congress.

Speaking broadly, the system of legislating by conference committee is unscientific and therefore defective. Usually it forfeits the benefit of scrutiny and judgment by all the wisdom available. Uncontrolled, it is inferior to that process by which every amendment is secured independent discussion and vote. On the other hand, it does bring result, action, conclusion, and perhaps under the conditions of our overworked assemblies this outweighs all other considerations.

Restraining the House of Lords

In the matter of relations between the two branches, the most interesting and important development of our time has concerned the position of the House of Lords in the constitutional system of England.

Let it be remembered that it took nearly three centuries to work out the system of passing bills by two Houses with which we are so familiar to-day. At the outset the petitions of the Commons reached the King sitting in Council. The Commons long contested that the Council should not interfere. By a famous petition in 1382 the Commons prayed that none of their petitions should be made law with additions or diminutions, and in 1406 they petitioned to have any of their bills back from the Lords to amend the same.[1] As the Lords gradually added legislative functions to those of a judicial nature, they came more and more to assert their right to pass upon the proposals of the Commons, in addition to making proposals on their own behalf, thus ever strengthening their position as the superior body.

Up to the reign of George I the House of Lords was distinctly more influential than the House of Commons. In the course of Walpole's ministry (1721–42), however, the Commons took first place. This has been attributed in part to Walpole's exercise of power while sitting in the lower House; in part to the increased prestige of membership in that body resulting from the Septennial Act of 1716, which extended the life of Parliament from three to seven years; and in part to the rise of the mercantile interest and its greater concern with the taxation prerogative lodged in the lower House.

[1] Adrian Wontner, *The Lords, Their History and Powers*, 14–15.

The decline in the influence of the House of Lords was accelerated by the social, economic, and political changes of the nineteenth century. The extension of the franchise, the spread of democratic ideas, the new conception of the powers and duties of the State, all combined to widen the gulf between the popular House and the House that especially represented tradition, aristocracy, wealth. Instinctively the Lords felt the growing precariousness of their situation. It was before the Parliament Act was passed that Sir C. P. Ilbert said in his little book on Parliament (p. 213): "The Lords have, for several generations, met the difficulties of the position by prudently and sagaciously limiting the exercise of their powers. They no longer claim the right — the constitutional as distinguished from the legal right — to exercise concurrent powers of legislation. When a bill is sent from the Commons, the Lords do not, in practice, exercise freely either the right to reject it if it is not in accordance with their own views, or the right to make substantial alterations. What they claim, according to an authoritative exposition by a leading member of their House, is the right and duty 'to arrest the progress of such measures whenever we believe that they have been insufficiently considered, and that they are not in accord with the deliberate judgment of the country.' In short, the claim made by them is to act as arbiters between the Commons and the country."

On another page (68) Ilbert said: "The House of Commons makes laws with the concurrence of the House of Lords and the King." It will be seen by this that Parliament had come to be clearly differentiated from the Legislatures and the Congress of the United States. With us the two chambers are in theory, and usually in practice, absolutely equal in power, barring the matter of initiating money bills. Even in respect of money bills, however, there is a distinct difference between the position of the Lords and that of an American Senate. We have been discarding restraints on our upper Houses until now they are quite free to enlarge, diminish, or reject appropriations voted by the lower branch, and indeed in the shaping of appropriations our National Senate is averred to have more influence in practice than the House of Representatives.

Precisely the opposite development has taken place in England. Long ago it came to be established that the Lords were not to interfere seriously with the will of the Commons in money

matters. To be sure, it was admitted in 1671 and 1689 that the Lords might reject a money bill, but they refrained from using the right in any degree likely to provoke a contest, although now and then rejecting or postponing bills that bore incidentally on supplies and taxation. Dispute arose when in 1860 they seemed to the Commons to carry their claim of privilege too far in postponing for six months the second reading of the Paper Duties Repeal Bill. Out of the ensuing discussion came resolutions by the Commons, one to the effect that although the Lords had sometimes exercised the power of rejecting bills of various descriptions relating to taxation, yet the exercise of that power was "justly regarded by the Commons with peculiar jealousy, as affecting the right to grant supplies, and to provide the ways and means for the service of the year."

Meantime, since 1832, as part of the development that made Cabinets in theory the reflection of the popular will, it had come to be an unwritten rule of the Constitution that the Lords were not to defeat any measure, whether fiscal or otherwise, that had been passed by the Commons in successive Parliaments, and thus certified, by an intervening election, as being the embodiment of a popular demand.

The Education Bill, brought forward by the Government in 1906 and passed by the Commons, was killed by destructive amendments of the Lords. This led the Commons to adopt a resolution proposed by Sir Henry Campbell-Bannerman, declaring that "the power of the other House to alter or reject bills passed by this House should be so restricted by law as to secure that within the limits of a single Parliament the final decision of the House of Commons shall prevail." The quarrel was brought to a head by the rejection of the Budget Bill in 1909, after the rejection of other important measures approved by the Liberal majority in the Commons. The Budget Bill contained many features extremely distasteful to the Conservatives, and especially to the landholding class, who controlled the House of Lords. Its rejection was put on the ground that it contained provisions not of a financial nature, thus taking it out of the class of "money bills" that the Lords might not reject. Thereupon the Commons adopted, by a vote of 349 to 134, a memorable resolution to the effect that "the action of the House of Lords in refusing to pass into law the provision made by the House of Commons for the finances of the year is a breach of the Constitution,

and a usurpation of the privileges of the House of Commons." The Asquith Ministry came instantly to the decision that the situation demanded an appeal to the country. In January, 1910, a general election took place, with the result that, though with a reduced majority, the Government was continued in power.

The approval of the electorate thus secured, the Liberal Ministry proceeded to work out a plan for controlling the House of Lords. It was put into the Parliament Act of 1911, which provided:

(1) A public bill passed by the House of Commons and certified by its Speaker to be a "money bill" is to become a law within a month after it has been sent up to the House of Lords, even though not consented to by that House, unless the Commons direct to the contrary. (2) Any other public bills (except to confirm a provisional order or extend the duration of Parliament beyond five years) sent up more than a month before the end of the session, in three successive sessions, are to become laws notwithstanding the Lords have not consented, but two years must have elapsed between the first real introduction of the bill and its final passage. (3) No Parliament is to last more than five years.

It will be seen that now, when the House of Commons is persistent enough, it prevails. In respect to measures thus made law, therefore, England no longer insists on the fundamental perquisite of a bicameral legislature — the power of one branch to negative the other. However, it is argued that in effect the bicameral purpose is accomplished by the necessity for two considerations and approvals — in the Cabinet and in the House.

The Welsh Disestablishment Bill of 1914 was the first to become law in spite of the Peers. Its date, May 19, was hailed as marking the opening of a new era in the political development of Great Britain. For those who want the road marked by milestones, this will serve as well as any, but let it not be forgotten that stones only mark the road, and that the roads of history never reach an end. Within three months broke out the World War, destined to upset human calculations in a thousand directions. Among the incidental effects of that cataclysm was the renaissance of the House of Lords. The virtual dictatorship of the Prime Minister, accompanied by abandonment of the party system, destroyed what little usefulness remained in the House of

Commons, leaving the House of Lords the only place where there could be free and effective criticism.

The new system is not a finality. Serious grounds for dissatisfaction and criticism remain. Out of them came the Bryce Conference of 1917–18, with resultant recommendations not only for a reconstitution of the House of Lords, but also for further change in the relations between the branches.

The eminent statesmen who composed this Conference started with agreement that the functions appropriate to a second chamber are: (1) the examination and revision of bills brought from the House of Commons; (2) the initiation of bills dealing with subjects of a comparatively non-controversial nature which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape; (3) the interposition of so much delay (and no more) as may be needed to enable the opinion of the nation to be fully expressed; and (4) full and free discussion of large and important questions. It was further agreed that a second chamber ought not to have equal powers with the House of Commons, nor aim at becoming a rival of that assembly. In particular it should not have the power of making or unmaking Ministries, nor enjoy equal rights in dealing with finance.

To meet these conditions it was recommended by the Conference that the second chamber should have no power to amend or reject a financial bill. For reconciling differences in the case of other bills, various methods were considered. That of a joint sitting of the two Houses was rejected because of the great size of such an assembly, difficulties attending its procedure, and the possibility that its presence in the background might make agreement in conference less probable. Referendum to the people was opposed on the ground that, once introduced, it could not be confined to the cases for which it was in this instance proposed; that it might tend to lower the authority and dignity of Parliament; and that it was unsuited to the conditions of a large country, and especially of the United Kingdom, for different parts of which different legislation is sometimes required.

The method preferred was that of free conference. At the beginning of each Parliament twenty members of each House should be appointed as a Joint Standing Committee of Conferences. To this committee should be added, on the occasion of reference of any particular bill, ten members of each House,

thus making sixty in all for consideration of the bill in question. If a bill reported by such a conference failed to pass either House, it should in the following session be again referred to such a committee, and then if reported back by a majority of not less than three, of those present and voting, it would, if approved by both Houses or by the House of Commons alone, be presented to His Majesty for the royal assent; otherwise it would lapse.

The novel suggestion that a certain proportion of each conference committee shall be members of the two branches selected in advance for a share in all conferences, with the other members selected for each particular case, has not a few evident merits and might well be considered by any bicameral legislature, whether or not working under the conditions of ministerial responsibility. Clearly such an arrangement would bring to a conference the decided benefit of the attitude taken by the membership at large, in addition to that of the members particularly interested. Further it should be noticed that the Bryce plan contemplates giving to the conference committee power to deal with the bill in such manner as may seem to it calculated to bring about an agreement between the two Houses, which inferentially means unlimited power of amendment, but the Bryce recommendation is that the report of such a committee may not itself be amended by either House.

Deadlocks Elsewhere

In the British Dominions the danger of deadlock between the branches has been guarded against in various ways and to varying degrees. The rule is that the upper House shall be subject to some disability in matters of finance. The law officers of the Crown hold that an upper House may not exercise more power than the House of Lords in amending bills for the levy or expenditure of money. In the Cape of Good Hope alone, and there by the original Constitution, was power to amend money bills specifically granted to the Council. On the other hand, the Natal Constitution of 1893 definitely said the Legislative Council might not alter a money bill; and the same prohibition appeared in the Transvaal and the Orange River Colony.

In South Australia as long ago as 1857 the Council won the privilege of suggesting changes in return for an agreement that it would not reject the ordinary appropriation bills. Protracted

struggles finally secured to the Victoria Council in 1903 what was in effect the right to amend, the compromise of the situation providing that Council and Assembly might be dissolved at the same time, and that the Council might at certain stages suggest amendments of money bills if the changes involved no increase in charge or burden. Violent disputes marked the controversy in West Australia, the outcome being alteration of the Constitution so that the upper branch might at any time return a money bill to the lower, with a message requesting omission or amendment, but it has since been decided that if the Assembly rejects the request, the Council may not insist.

The quarrels that the difficulty had bred, naturally invited the framers of the Federal Constitution for Australia to attempt a more satisfactory solution of the problem. The delegates of the larger States preferred a referendum to the people in case of a deadlock between the branches. It was to the interest of the smaller States to meet the need by giving more power to the Senate, with its equal representation. In the end it was agreed that if the Senate should twice fail to pass any bill sent up from the lower branch, whether financial or otherwise in its nature, three months having elapsed between the two transmissions, the Governor might dissolve the two Houses, and if the newly chosen Senate should again fail to pass the measure, then by an absolute majority of all members of both Houses, voting in joint session, it might be presented to the Governor-General for the King's assent. Simpler and speedier is the method provided by the Constitution of the South African Union. There the joint session is to come after one failure of the Senate to pass a money bill, or after failure to pass other kinds of bills sent up in two successive sessions; and the vote in joint session is to be a majority of the members present. This permits most of the more important measures to be concluded within the limits of a single session, and assures control to the Ministry, provided its majority in the House outnumbers the excess of its opponents in the Senate. Queensland has preferred to solve the problem by declaring that if a measure sent up in two successive sessions fails to pass the Senate, it may be referred to the people, and if by simple majority they approve, it shall then go to the Governor as if it had passed the two Houses.

In Norway, where the Parliament (the Storthing) is made up of two bodies known as the Lagthing and Odelsthing, bills start

in the Odelsthing. If the Lagthing rejects one, it goes back to the Odelsthing, which may send it up again, with or without change. If the Lagthing rejects it a second time, then the two bodies sit jointly, and a two-thirds vote prevails. In Sweden, when the two Houses differ on money bills, each votes separately on the matter in dispute, the votes are added together, and the majority prevails. In Hesse-Darmstadt it was provided that if the upper Chamber rejected the financial proposals of the lower Chamber, the Budget Bill should then be discussed in a sitting of both Chambers together and a decision taken by the absolute majority. Joint session is used in France, but only for constitutional amendment. Joint sessions are sometimes held in Holland, but only for occasions of state and formality. In Portugal, if a bill sent by one House to the other is not therein decided upon before the end of the following session, it then becomes law.

In the Austrian Reichsrath if there was repeated disagreement between the two Houses over items in an appropriation bill or over the size of the contingent recruits for the army, the smaller figure voted by either House was considered as granted. Of the practice under the new conditions I am not informed.

Three South American countries, Argentina, Brazil, and Chile, have still another method for lessening deadlocks between the two Houses. When a bill having passed one House (which for clearness we will call No. 1), is amended in House No. 2, it goes back to No. 1 for concurrence in the amendments, as with us. If No. 1 rejects them, then it goes to No. 2 again. If No. 2 insists on its amendments, by a two-thirds vote, then the bill goes back to No. 1, and the amendments stand unless they are rejected in House No. 1 by a two-thirds vote. In Argentina and Brazil, if one House wholly rejects a bill coming from the other, it is dead for that session, but in Chile, if it is rejected by House No. 2, it goes back to No. 1, and if No. 1 passes it by a two-thirds vote, it becomes a law unless then No. 2 rejects it by a two-thirds vote.

The Constitution of the German Commonwealth (1919) provides that if the National Assembly and the National Council cannot reach agreement, the National President may within three months refer the subject of the dispute to the people, but if he makes no use of this right the law does not go into effect. If the Assembly disapproves the objection of the Council by a two-thirds vote, the President is either to promulgate the law in the form in which it passed the Assembly, within three months, or

refer it to the people. Before the adoption of this idea in Germany, its use had been urged in the United States, as preferable to the popular initiative, the contention being that approval by a House or Senate would be a better guarantee of importance, seriousness, and good faith, than that given by any mass petition. Furthermore, a measure passed by a legislative body would have had committee consideration giving some probability of adequacy in point of detail and form.

CHAPTER XVIII

COÖRDINATION

"The necessity for the concurrence of the three branches of the legislature constitutes the excellence of our Constitution." So declared Chief Justice Holt in the great Aylesbury case, in 1704. Of course he had in mind the Crown as one of the three branches. In England the Crown has become a legislative cipher and with us the Executive can be overruled, so that to-day a like encomium would not go beyond two branches, but the necessity for concurrence to that extent is still generally thought a constitutional excellence of high degree. Barring exceptional devices for giving the lower House its way if the upper persists in opposition, it is probably the universal rule that in a bicameral legislature one branch cannot act by itself in a legislative capacity. That it cannot alone even clothe itself with the minor qualities of a legislature was brought out in the English case of Stockdale *v.* Hansard, which decided in effect that a libelous document did not cease to be a libel because it was published by the House of Commons, or because the House subsequently resolved that the power of publishing the report containing it was an essential incident to the constitutional functions of Parliament.

On this side of the water the matter came up in November of 1770, when the Massachusetts House of Representatives added to its quarrels with Lieutenant-Governor Hutchinson one about the style of enacting. Hutchinson informed the House it was His Majesty's instruction that the style should be "by the Governor, Council, and House of Representatives." The House insisted there should be added the words, "in General Court assembled," as not merely words of form, but of substance, and necessary to the validity of every act. You may find the controversy that followed set forth in "Massachusetts State Papers," 279 *et sqq.* It was like the other disputes of the decade that led to Lexington — on the colony side wordy, meticulous, keen, irritating; on the Government side suave, condescending, here and there impatient. The colonists appear to have feared in this instance some danger dimly seen. The style required by the Crown had in fact been in use thirty years. Just why it was adopted, Hutchinson

said he did not know — perhaps merely because the old style was unnecessary and redundant. That it did not follow previous usage on both sides of the water was enough for a quibbling point of the kind it looks as if the colonial lawyers deliberately sought in order to embroil the situation further — very likely a wise policy to arouse the people.

Hutchinson in the course of the controversy laid down this proposition: "The words 'House of Representatives,' in our laws, are technical and used in an appropriated sense, and signify a body of men, who are an essential part of the General Court or Assembly, and which part can have no separate existence; and, the instant the General Court or Assembly is dissolved, the House of Representatives is annihilated; and, the instant the General Court is prorogued, there is a temporary cessation of the existence of the House, or, what is equivalent to it, an incapacity of exertion of any sort of power." Hence he argued that every valid act of the "Governor, Council, and House of Representatives" must be an act of them "in General Court assembled." [1]

Perhaps John Adams had the episode in mind when he drew the Massachusetts Constitution, for he divided the chapter on "The Legislative Power" into three sections, headed respectively (1) "The General Court," (2) "Senate," and (3) "House of Representatives." Yet, he said, "the department of legislation shall be formed by two branches." To this he added, "each of which shall have a negative on the other." New Jersey had been equally specific with "The consent of both Houses shall be necessary to every law." When Vermont created a Senate, in 1836, she declared: "No bill, resolution, or other thing, which shall have been passed by the one, shall have the effect of, or be declared to be, a law, without the concurrence of the other." For the most part, however, explicit statement of this sort has not been deemed necessary by the Constitution writers. Indirectly the intent is commonly disclosed by requiring that a bill submitted to the Governor shall have passed both Houses.

Independent action by the two bodies was clearly contemplated by the Virginia provision that the legislative department be "formed of two distinct branches, who, together, shall be a complete Legislature." New York was more emphatic with "The supreme legislative power within the State shall be vested

[1] *Mass. State Papers*, 291.

in two separate and distinct bodies of men, who together shall form the Legislature." North Carolina at the outset and South Carolina in her second Constitution each used the adjective "distinct." The potential importance of the matter is suggested by the action of the Kansas House in 1877, when it protested against receiving the Governor's message by a joint convention of the two Houses, "because such a gathering does not constitute the Legislature of the State of Kansas." Joint conventions for ceremonial purposes have not been unfamiliar, and sometimes they have been prescribed for purposes of election, but their use for lawmaking will undoubtedly require constitutional sanction. Tendency in this direction might be inferred from the recent action of Massachusetts in providing for consideration of proposed constitutional amendments in joint sessions of the General Court. The idealistic Constitution that Gabriele d'Annunzio furnished to the Free State of Fiume August 27, 1920, provided that the two legislative branches should meet as one body once a year, forming a great National Council to deal with and pass upon relations with other States, finance and treasury matters, higher education, revision of the Constitution, and the extension of freedom.

Our fathers did not without friction come to agree that the two branches of a legislative body should be coördinate and that neither should surpass the other. Human nature would not let such a conclusion be reached without attempt on each side to win precedence and advantage. A curious instance of this may be found in a Massachusetts episode of 1765 when the Council undertook to make a material alteration in a bill that had come up from the House, to which body a new draft was returned for passage. In this the House contended the Council had exercised a degree of interference and dictation that the House deemed very improper. The measure was not a money bill, and the House did not deny the right of the Council to alter, but it questioned the propriety of having a bill, thus materially altered, appear as if it had originated in the House. As a matter of punctilio the affair indicates the jealousy the House felt as to its prerogative. What is of more consequence, it suggests the reason why in more than half of the State Constitutions it has been thought necessary to say that a measure may be amended in the House in which it did not originate.

In Maryland the upper House had used the whip hand. It was

in 1669 that the delegates to the Assembly presented to the upper House a paper of seven grievances, at which the upper House took offense, ending a parliamentary squabble with an ultimatum to the lower House to expunge the offensive votes from its Journal, or be dissolved by the Governor. This brought the Assembly to terms. It declared its readiness to have its Journal expunged or obliterated, or the form of stating the grievances changed in any way, if thereby the weight of them could be removed from the province. The upper House then modified its demand, so as to require only that certain of the complaints should be expunged. To this the Assembly agreed, the upper House promising on its part to use its influence with the proprietor to secure a limitation of certain fees and court charges.

Rhode Island found an ingenious way for avoiding such quarrels. In 1672 the Treasurer of that colony was instructed to provide, at public expense, a dinner "ffor the keepinge of the Magistrates and Deputies in love together, for the ripeninge of their consultations, and husbandinge of their time." Such laudable motives might commend the practice for occasional imitation even to-day.

Perhaps a dinner at the public expense would have saved Connecticut from a ridiculous episode soon after the Revolutionary War. Its House of Representatives had taken offense at a certain act of Congress. Noah Webster relates that the upper House, understanding the necessity and expediency of the measure better than the people, refused to concur in a remonstrance to Congress. Several other circumstances gave umbrage to the lower House; and to weaken or destroy the influence of the Senate, the Representatives, among other violent proceedings, resolved not merely to remove the seat of government, but to make every country town in the State the seat of government, by rotation. "This foolish resolution," Webster says, "would have disgraced schoolboys — the Senate saved the honor of the State by rejecting it with disdain — and within two months every Representative was ashamed of the conduct of the House. All public bodies have these fits of passion, when their conduct seems to be perfectly boyish; and in these paroxysms, a check is highly necessary."[1]

Trivial though it seems, yet jealousy or false pride has at times absurdly marred the relations between the branches. In 1772 Burke complained bitterly that he had been kept three

[1] Ford's *Pamphlets on the Constitution*, 33–34.

hours waiting at the door of the Lords, with a bill sent up from the Commons. The Commons were so indignant at this treatment of one of their number that, shortly afterward, when a bill was brought down from the Lords to impose a bounty on corn, the House rejected it by a unanimous vote. The Speaker then tossed it across the table on the floor, and a number of members rushed forward and kicked it out of the chamber.

A somewhat similar occurrence is described by the acidulous Senator Maclay in his "Journal" under date of April 28, 1789. He prefaces it with a delicious bit of character drawing at the expense of his New England colleagues, which, though not particularly pertinent to the story, is too good to omit.

"I have had full opportunity," he wrote, "of observing the gentlemen of New England, and sorry indeed am I to say it, but no people in the Union dwell more on trivial distinctions and matters of mere form. They really seem to show a readiness to stand on punctilio and ceremony. A little learning is a dangerous thing ('t is said). May not the same be said of breeding? It is certainly true that people little used with company are more apt to take offence, and are less easy, than men much versant in public life. They are an unmixed people in New England, and used only to see neighbors like themselves; and when once an error of behavior has crept in among them, there is small chance of its being cured; for, should they go abroad, being early used to a ceremonious and reserved behavior, and believing that good manners consists entirely in punctilios, they only add a few more stiffened airs to their deportment, excluding good humor, affability of conversation, and accommodations of temper and sentiment as qualities too vulgar for a gentleman.

"Mr. Strong [Senator from Massachusetts] gave us this morning a story, which, with many others of a similar nature (which I have heard), places this in a clear point of light. By the Constitution of Massachusetts, the Senate have the right of communicating bills to their lower House. Some singular business made them [the lower House] shut their doors. At this time called Samuel Adams of the Senate to communicate a bill. The doorkeeper told him his orders. Back returned the enraged Senator; the whole Senate took flame and blazed forth in furious memorial against the Lower House for breach of privilege. A violent contest ensued, and the whole State was convulsed with litigation." [1]

[1] *Journal of William Maclay*, April 28, 1789.

Very likely it was one of these punctilious New Englanders who worked out a code of etiquette for the Federal Senate soon after it first assembled. On the 23d of April, 1789, the committee to report a mode of communication to be observed between Senate and House made this report to the Senate, which was accepted:

"When a bill or other message shall be sent to the Senate from the House of Representatives, it shall be carried by the Secretary, who shall make one obeisance to the Chair, on entering the door of the House of Representatives, and another on delivering it at the table into the hands of the Speaker. After he shall have delivered it, he shall make an obeisance to the Speaker, and repeat it as he retires from the House.

"When a bill shall be sent up by the House of Representatives to the Senate, it shall be carried by two members who, at the bar of the Senate, shall make their obeisance to the President, and thence, advancing to the Chair, make a second obeisance, and deliver it into the hands of the President. After having delivered the bill, they shall make their obeisance to the President, and repeat it as they retire from the bar. The Senate shall rise on the entrance of the members within the bar, and continue standing until they retire.

"All other messages from the House of Representatives, shall be carried by one member, who shall make his obeisance as above mentioned; but the President of the Senate, alone, shall rise." [1]

The more sensible House of Representatives refused its assent to the plan.

Nevertheless, some degree of ceremonious formality in the relations between the Houses has definite usefulness. When minor processes can be conformed to rule, time can be saved, embarrassment and friction avoided. Some measure of dignity, too, is desirable in the forms of such serious work as that of making laws. Even in such democratic surroundings as ours, a little more of ceremony in these things would not be amiss.

Cushing properly observes that nothing is or can be more essential than the existence of harmony and a good correspondence between the branches. To this end each should on all occasions pursue the accustomed methods of proceeding, and observe the usual ceremonies in whatever communications take place; they should respectively abstain from every proceeding inconsistent

[1] *Annals of Congress*, I, 24.

with the privileges of either House; the members of the two Houses should respectively abstain from all offensive and unparliamentary remarks, either in debate or in any other parliamentary proceeding, of or toward the other or its members, or toward the executive; and the two Houses should extend to each other and their members respectively all the accustomed courtesies and civilities, which are due from one equal to another.[1]

It has therefore become a recognized principle of parliamentary practice that each branch of a legislature should abstain from all such interference with the proceedings of the other as might tend to injure its freedom and independence, by exerting any undue influence upon it in respect to any pending measure. When Jefferson compiled his "Manual," he found that in Parliament it was a breach of order in debate to notice what had been said on the same subject in the other House, or the particular votes or majorities on it there; "because the opinion of each House should be left to its own independency, not to be influenced by the proceedings of the other; and the quoting them might beget reflections leading to a misunderstanding between the two Houses." [2]

There is, indeed, strong reason why "reflections" by one House on the other should not be tolerated. At the best their relations are those of rivals, and slight provocations may turn latent jealousy into bitter enmity. Attack in one House upon a member of the other is rightly felt to be unfair, for there is no chance of direct reply. As Disraeli said: "It is not merely that we criticize the words of those who are absent, but that unfortunately we may criticize words which were never spoken." Parliament has no standing order on the subject, but in closing a discussion of it in the Commons in 1876, the Speaker observed that the unwritten law of Parliament is of force equal with if not greater than any standing order, and he concluded: "I collect from the discussion which has now taken place that it is the desire of this House that the law of Parliament in this respect should be strictly observed and obeyed."

In Congress no great strictness prevails in the matter, though sometimes action is taken in a flagrant case. The House of Representatives in 1890 passed a resolution expressing its disapproval of a disrespectful reference to the Senate made in the

[1] *Law and Practice of Legislative Assemblies*, 289, 290.
[2] *Jefferson's Manual*, sec. XVII.

speech of a member, and ordered that it be excluded from the permanent record. On the 24th of June, 1919, Representative Ben Johnson uttered certain remarks in the House which in a resolution by the Senate two days later were declared to impute dishonorable motives and conduct to Senator Pomerene of Ohio. The resolution said this was a breach of privilege, calculated to create unfriendly relations between the Houses. On receipt of a copy of this, the lower branch solemnly retorted by resolving that the Senate resolution was itself a breach of the privilege of the House, and then by a separate resolution proceeded to order the offensive matter stricken from the Record. This meant that the House was willing to discipline its own member, but resented being told so to do by the Senate.

In each branch it is no uncommon thing to hear doings in the other referred to by some circumlocution, but even that is not justifiable, strictly speaking. In May of 1884 Senator Edmunds presiding called Senator Frye to order for saying, "No bill can possibly pass the Senate that some member of the House will not be opposed to." Thereupon Mr. Frye attempted the familiar retort: "Then I will suppose a case. A point of order may be made against it in another place," etc. This brought from Mr. Edmunds: "The Chair must interrupt the Senator from Maine. The Chair thinks that that does not bring his observation within the rule." [1] Nevertheless, the practice when kept within bounds does no great harm, and so often helps toward clarity of discussion that common sense approves. It is one of the cases where the spirit of the rule is of more consequence than the letter.

Overmuch nicety in those things does more harm than good. A ridiculous episode in the provincial history of North Carolina may illustrate the dangers of punctilio. In the Assembly of 1764, the lower House saw fit to speak of the Council as a "Board." The upper House returned an angry remonstrance, and refused to proceed to business until the offensive term was withdrawn. So much temper was displayed that they could not agree as to the appointment of an English agent, and Couchet Jouvencel was selected for that position in place of Anthony Bacon, by a separate resolution of the lower House.[2]

Congress has been careful to avoid even the appearance of pressure by one branch on the other. Two instances of exception

[1] *Gilfry's Precedents*, 436.
[2] J. W. Moore, *History of North Carolina*, 82–83.

to the rule are given as rarities. In January of 1807 the Senate passed a bill "to suspend the privilege of the writ of habeas corpus for a limited time in certain cases," and sent it to the House with a confidential message asking concurrence as speedily as the emergency of the case should, in the judgment of the House, require. Five years later, April 2, 1812, the House sent a confidential message to the Senate asking its concurrence in the passage of a bill laying an embargo on all ships and vessels in the ports and harbors of the United States; and the committee was instructed to impress on the Senate the importance of a speedy consideration of the bill.

Rise of the Federal Senate

In the course of the inevitable rivalry and conflict between the two branches, the Senate of the United States has gained and the House of Representatives has lost. While the upper chambers of most other countries have waned almost to the point of insignificance, in Congress the upper chamber has waxed mightily. Today it is even stronger than when after nearly a century of its existence Sir Henry Maine could say: "The one thoroughly successful institution which has been established since the tide of modern democracy began to run, is a second Chamber, the American Senate." Such unstinted credit would astonish a good many Americans if they learned of it. A prophet is not without honor save in his own country, and it has not in our day been the custom to make to this rule any exception in favor of the Senate. Nevertheless, the clear fact is that our upper House is as near a success as any political institution the world has ever known, if it be granted that democracy itself is a success.

The Senate now dominates. Yet for a generation it was much the less important branch of the Congress, and for long afterward power wavered between the two wings of the Capitol. At the start the Senate did not take its legislative functions very seriously. It seemed to think itself a conference of ambassadors of the States. So for five years it sat behind closed doors and deliberated on confidential communications. In privacy it conferred with members of the Cabinet and even the President himself.

Assemblies like individuals reveal themselves in their bearing and manner. A contemporary description throws light on the conception the Senate originally had of itself. According to a

Philadelphia newspaper of 1791, as quoted by J. W. Moore, "among the Senators is observed constantly during the debates the most delightful silence, the most beautiful gravity, and personal dignity of manner. The very atmosphere of the chamber seems to inspire wisdom, mildness, and condescension. Should any of the Senators so far forget for a moment as to be the cause of a protracted whisper while another was addressing the Vice-President, three gentle raps with his silver pencil-case by Mr. Adams immediately restored everything to repose and the most respectful attention. The Senators, in their courtesy, present a most striking contrast to the independent loquacity of the Representatives below stairs, most of whom persist in wearing, while in their seats and during the debates, their ample cocked hats placed 'fore and aft' upon their heads." [1]

Apparently the Senate thought the treatment of foreign relations its most important duty, living up to Jefferson's view that "the federal government is only our department of foreign affairs." The treaty-making power was indeed to prove one source of the strength of the Senate, one cause for its greater success. Another was its power of passing on the President's appointments to office, developed in time to the aggrandizement of Senators and the humiliation of Presidents. Notice that these were extra-legislative powers. To be sure, treaty making is lawmaking of a sort, and yet its character is little more legislative than it is executive. Between the parties a treaty is rather a contract than a law. Appointments to office are not legislative at all, and are relevant to a work on lawmaking only in so far as they may have modified the character of legislative bodies on which they have been grafted. Of course, as the country grew, the number of appointments to be ratified grew with it, adding steadily to the consequence of this Senatorial prerogative through its political bearing. With the enthronement of the theory that to the victor belong the spoils, the Senate became easily the greatest partisan force in the country.

Growth also strengthened the Senate by turning it from a small body, little more than a council or committee, where oratory was out of the question, into a forum large enough for the exercise of brilliant parliamentary powers. The addition of two Senators with every new State brought it to this point about the time that Webster, Clay, and Calhoun became the most eminent

[1] *The American Congress*, 143.

statesmen of the land. With others not far behind, they made a galaxy of oratorical splendor that gave a renown and prestige to the Senate firmly fixing its superiority in the public belief.

It was in the course of the ascendancy of these men that De Tocqueville visited America and in the famous book he wrote about us praised the Senate at the expense of the House. Benton took sharp issue with his notion that the superiority of the upper branch was due to indirect election. "Almost every distinguished man in the Senate," says Benton, "or in any other department of the government, now or heretofore, has owed his first elevation and distinction to popular elections — to the direct vote of the people, given, without the intervention of any immediate body, to the visible object of their choice. The Senate is a smaller body, and therefore may be more decorous; it is composed of older men, and therefore should be graver; its members have usually served in the highest branches of the State government, and in the House of Representatives, and therefore should be more experienced; its terms of service are longer, and therefore give more time for talent to mature, and for the measures to be carried through which confer fame. Finally, the Senate is in great part composed of the pick of the House, and therefore gains double — by brilliant accession to itself and abstraction from the other." [1]

Nevertheless, it is altogether probable that the remarkable representation of some States in the Senate was due to a wiser choice by Legislatures than would have resulted from a popular vote. Whether this was true in the greater number of instances will always be a mooted point.

More far-reaching because more fundamental, though less conspicuous, was the influence of the method of replacing the membership. Since but a third of the members ran the gantlet of election at one time, and many of that third were sure to be reëlected, a continuity of personnel was secured that made possible the development of a body of precedents, traditions, customs, creating a corporate spirit against which the ever-changing House would struggle in vain. The term of office, six years, has proved long enough to get most Senators safely through the dangers of those gusts of popular passion that have so often ruined the careers of Representatives. On the other hand, it has permitted the supplanting of men unable to adapt themselves to

[1] *Thirty Years' View*, I, 206.

genuine and fairly permanent shifts of public sentiment, an advantage attainable in much less degree where life tenure prevails and some men may obstruct progress for a score or more of years before death removes them.

To-day the most powerful factor in making the Senate stronger than the House rests on the difference between the rules and practices of the two bodies. A more striking instance of the effect of mere machinery on governmental institutions would be hard to find. In one branch this machinery elevates the individual; in the other it subordinates him. Any Senator may freely exert his full strength; only the exceptional Representative can do his best.

A Senator may at any time address himself to whatever topic he thinks of importance. He can strike while the iron is hot. He can get the ear of the public because he can talk about the things in which the public is at the moment interested. In the House this is almost precluded. There every resolution must go to a committee if any one member objects to immediate consideration. Indeed, requirement for unanimous consent virtually blocks every avenue of independent action. Reference to committees ensures postponement until interest has waned and enthusiasm has evaporated.

The dreary, dreadful waste of time in the House by roll-calls, by the reading of bills instead of reliance on printed copies, by disputes over points of order, and by debate irrelevant to the pending question, makes the proceedings for the most part so tedious that the members themselves stay away all they dare, and, worse yet, empties the press gallery. Rare, indeed, is it now for any speech delivered in the House to go out to the country, even in brief abstract. On the other hand, the Senate furnishes so much of timely, newsy material that the reporters give its proceedings a constant watchfulness resulting in some measure of publicity. So the Senate still moulds public opinion to some degree, but in the public mind the House is almost a cipher.

Much ink has been used in discussing whether or not the Senate has usurped powers not rightfully its own. It has been shown that at least in embryo they may all be found in the early records, but as Reinsch well says, its powers were orginally exercised in isolated cases, without that systematic coördination and constant use which has tended to place all the controlling threads of governmental machinery in its hands.[1]

[1] *Am. Legislatures*, 80.

The clear fact is that the Senate once was weak and now is strong.

Toward the end of the nineteenth century the growth of the power of the Senate had so alarmed many observers that savage criticism became rampant. Great fortunes rapidly made in the era of prosperity after the Civil War gave some men the means to buy their way into the Senate, and calumny proceeded to caricature it as nothing but a rich men's club. There was reason to fear that other Senators owed their election to corporation influences. On various occasions radical reformers found the Senate obdurate. In brief, suspicion became general, attack became violent. As virtuous a statesman as our time has seen, Senator George F. Hoar, came to the defense in an article in the "Forum" for April, 1897, from which it is worth while to quote, both because of its earnest spirit of truth and because of its historical value:

"The Senate was created that the deliberate will, the sober second thought of the people might find expression. It was intended that it should resist the hasty, intemperate, passionate desire of the people. This hasty passion and intemperance is frequently found in the best men as in the worst. But so long as the political management of the country excites eager interest, so long these feelings will be excited; and when they are excited the body whose function it is to resist them will be, for the time being, an object of dislike and attack. It has, therefore, always been true, is now true, and always will be true, that the Senate is an object of bitter denunciation by those persons whose purposes are thwarted or delayed. This will be especially true when the House and Executive, the popular majority, are of one way of thinking and the Senate, representing the will of the majority of the States, is of another way. It is fair, therefore, that the Senate should be judged not by considering its conduct or its composition at the time when the judgment is to be expressed, but by a review of a whole century of its history.

"We have a right to show in what we have improved. We have a right to say that the evil influences of the lobby in legislation for private and not public ends, which, like the ointment of the hand, bewrayed themselves in the atmosphere of the Senate Chamber and in its corridors, are all gone to-day. We have a right to say that drunkenness, which existed when I first entered public life, is not known there to-day, and that Senators no

longer bring whiskey-soaked brains to meet the high demands of the public service. We have a right to say that the use of executive patronage for personal advancement — so that each Senator who supported the Administration had a little army of followers devoted to his personal interests, supported at the public cost — has gone by. We have a right to say, also, that if important legislation, demanded for the public welfare, is often defeated by obstructive measures or prolonged and needless debate now, for the eighty years while slavery ruled, and while the strict State-rights construction prevailed, such legislation was not even introduced and its chances were not worth considering. We have a right to say that the work the Senators now give to the public service, day and night, is a constant, hard work which was unknown in either House of Congress, save to a very few persons, fifty years ago. Men who belonged to the minority were not permitted to share even in the ordinary routine business of legislation. It was considered almost an audacity in former times for one of them to move to adjourn. Levi Lincoln told me that his time, when he was a Whig member of Congress, hung heavily on his hands, and that neither he nor any of his Whig colleagues was permitted to take the slightest share in the duties of legislation.

"Talk about the degeneracy of the Senate! I am writing these lines upon the desk, I am seated in the chair, by whose side Charles Sumner was stricken down in the Senate Chamber for defending liberty — his comely and beautiful head the target for a ruffian's bludgeon. There were Senators standing by and looking on and approving. There were others standing by without interfering. The Senate neither dared to punish nor to censure the action; and the offender was fined $300 in a police court. This was forty years ago. Read Oliphant's account of the passage of the reciprocity treaty of 1854 — a treaty which, as Lord Elgin described it, floated through on waves of champagne! Laurence Oliphant, the British Secretary, tells the story to his mother — a story, if it be true, as disgraceful to him and his superior as to us. But he excuses himself with the comment, 'If you have got to deal with hogs, what are you to do?'

"Talk of the degeneracy of the Senate to men who remember the time when a Vice-President was inaugurated in a state of maudlin intoxication; or the earlier days when Foote uttered in debate his threat to Hale, that he should be hung on the tallest

tree in the forest if he should come to Mississippi; when the same man drew his pistol on Benton in the Senate Chamber; when Butler poured out his loose expectoration, and Mason gave exhibition of his arrogant plantation manners; or when Sumner likened Douglas to the noisome, squat, and nameless animal, who switched his tongue and filled the Senate with an offensive odor — therein quoting an epithet once applied to Lord North in the House of Commons."

In spite of such arguments the apprehensions of the people persisted. The years that followed were a period of fault-finding. The first decade of the twentieth century should go down to history as the epoch of muckraking. Distortion of truth was reduced to a fine art. Exaggeration, misrepresentation, slander, filled the periodicals, bringing to some of them unprecedented profits that stimulated others to try to excel in perversity. The public appetite was whetted and seemed insatiable. Nothing was too gross and improbable to disgust readers. In the riot of calumny the Senate did not escape. To repeat here any of the abuse would be of little avail. It may, however, serve as a record of the spirit of the time to give a specimen or two of the more moderate criticism.

For that aimed chiefly at methods, take a quotation from an article by Henry Loomis Nelson, long a sagacious observer of Congress. Said he: "The overshadowing power of the Senate is unquestioned, and is exerted every day of the political year. The Senate, indeed, possesses many virtues which are conspicuously absent from the popular branch. It considers measures, and debates them freely. Its minority has often been guilty of willful and injurious obstruction, but loquacious obstruction is not so hurtful to the public interests as silent obedience. There is nothing more hostile to the general welfare than concealment of the reasons for and against the enactment of laws; nor are there many things more desirable in a modern democracy than the suppression of legislation by obstruction or otherwise. Buckle's view is truer than ever: the chief value of legislation to-day lies in the opportunity and power to remedy mistakes of the past: 'Repeal is more blessed than enactment.' The Senate contains industrious and intelligent men who work for the public interests, but its power over the President tends to the corruption of the public service, while its domination over the House of Representatives, coupled with the rules and the practices of the

hierarchy, makes that body a silent assemblage without the power which the law intended it to exercise." [1]

An editorial from the "Outlook" of April 7, 1906, may illustrate the more temperate personal criticism of the time. In part it read: "Of the presence of a number of men of ability and integrity in the Senate there is no question; but it is a great misfortune that a body which is in the habit of regarding itself as the most important legislative body in the world should have had three of its members under indictment for felonies within two years; that it should count among its members a few men who are very gravely and for good reason distrusted by their fellow citizens; that it includes altogether too many managers of political machines who control the entire political organizations of their States; that a small group of Senators stand together too definitely for business in politics — that is to say, for that 'system' of interweaving business and political interests which more than any other single thing has corrupted and lowered the tone of our public life. . . . In our judgment nothing can more effectively remove these causes than the election of Senators by popular vote."

Such criticism from thoughtful men, together with much that was far less merited, ended by developing the public opinion necessary to accomplish that well-nigh impossible thing, an amendment of the Constitution, whereby in 1913 direct election of Senators was achieved. Enough time has now elapsed to warrant the passing of judgment upon the effects of the change. Lacking the opportunity for personal observation of the Senate as chosen under both the old and the new plan, I have turned to a capable and experienced Washington correspondent, William E. Brigham of the "Boston Transcript." He answers my inquiry: "I am unable to feel that the personnel of the United States Senate has improved in character under the new system of election of Senators by the people. I think, on the contrary, it has distinctly deteriorated. It was said of the Senate, when that body was elected by the Legislatures: 'It is a rich man's club.' If that was true then — and it was not — it is doubly true now; for under the old system a candidacy for the Senate involved much less expenditure than one before the people, if a thorough campaign is made. But that is not the major point, which is that Legislatures never dared to send cheap men to the Senate. If

[1] "The Overshadowing Senate," *Century Mag.*, Feb., 1903.

there were exceptions, they merely proved the rule. The man who served 'special interests' in the old days was no more dangerous than the demagogue of to-day; he at least had business sense, which the oratorical demagogue who goes shouting for his own election usually has not."

From time to time appear suggestions for what their authors think will be improvement of the membership and character of the Senate. The most common has been to the effect that our ex-Presidents might well be made members for life. The proposal makes no headway. Indeed, no change is likely unless our conceptions of the function of the Senate radically change.

CHAPTER XIX

PRESIDING OFFICERS

THERE were presiding officers in the assemblies of the ancient states, but nothing leads us to suppose that they played an important part in the early gatherings of Englishmen, except so far as the King himself presided in the days of the Witanagemot. When Parliaments came, there was at first little occasion for what we now think of as a presiding officer, for these at the outset were not essentially deliberative bodies. The agents of boroughs and shires were instructed what sort of a bargain to make with the Crown, and the need for consulting with each other was small. Gradually they undertook to make decisions on which their principals had not been consulted and then it became necessary to choose somebody to lay these before the King. Such a spokesman might be an outsider. There is record of at least one instance in which the messenger appears to have been a man employed as counsel, but members were chosen at any rate from 1376, when Peter de la Mare acted. His successor, Thomas Hungerford, was said "avoir les paroles" — to speak — for the Commons, and from that day the list of "Speakers" is complete.[1]

The Speaker, then, was really the speaker — of the House — to the King. As Sir Thomas Smith described him, he was "the mouth of Parliament." At first he was chosen by the body for which he was to speak, and it seems absurd that any other method of choice should ever have been permitted, but with the subserviency that befell Parliament in Tudor times, the monarch added this to his prerogatives. Coke (4 Inst., 8) finds an excuse: "For avoiding of expense of time and contestation, the use is, as in the *congé d'eslire* of a bishop, that the King doth name a discreet and learned man whom the Commons elect." The procedure did no credit to the independence or self-respect of Englishmen. When the House had gone through the form of an election, one of its members presented their nominal choice to the King, as their "parlour et procurateur." With feigned humility the object of the King's favor protested his insufficiency for so

[1] Stubbs, *Const. Hist. of England*, III, 453.

great a responsibility, but the King, no doubt laughing in his sleeve, solemnly reassured the diffident parasite. Thereupon, the overpowered Speaker begged that his words might be regarded as those of the House and that no offense might be taken if he omitted what he ought to say or said what he ought not to say, with much more of like deprecation. Long after the servile formula became meaningless, the pretense was continued.

In the contests with the Stuarts, Speakers began to pluck up courage. There is no more honorable episode in parliamentary history than that of 1642 when the House refused to give up to Charles I five of its members impeached of high treason and the King determined to go to the House at the head of an armed body in order to remove by force the leaders of the opposition. From the Speaker's dais he addressed the House, demanding the surrender of the five members whom he had accused. Receiving no response to his inquiries, he turned to the Speaker, William Lenthall, and asked whether they were present. Lenthall, falling on his knees before the King, replied: "May it please your Majesty, I have neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here."

One of the liberties brought to the Commons by the Revolution of 1688, in effect if not in form, was the independent choice of their spokesman. Another change, gradually made, was the shifting of emphasis from the function of spokesman to the function of president. The Speaker is still the official voice of the House, as in all other legislative bodies, speaking for it in receiving visitors, messages, invitations, in extending thanks, administering censure, or otherwise giving expression to the will of the House. These, however, are mere formalities, now of no importance in comparison with the province of real consequence, that of conducting the business of the House and umpiring its deliberations.

The word "umpire," though to-day in America, at least, so commonly confined to the athletic field as to make its use in matters of legislation almost undignified, yet has good legal warrant and describes better than any other the position of the English Speaker. It carries somewhat more of the idea of guiding authority than "arbitrator" or "referee," and at the same time predicates complete impartiality. Herein lies the essential difference between an English and an American Speaker. Our presid-

ing officers are expected to be impartial to a degree only. Not so in England. There the Speaker is expected to sever himself from partisan motives as far as human nature will permit. Custom forbids him to give any help to his own party even by personal advice. Such is the anxiety to avoid so much as a suspicion of partisan thought that most if not all of the recent Speakers have never entered the political clubs of their party after accepting the office.

Upon election the Speaker forfeits in effect his rights and privileges as the representative of a constituency. Although chosen each time for the duration of one Parliament, he usually serves through several terms, retaining office regardless of changes of ministry, until his health fails or for some personal reason he sees fit to resign. His salary is five thousand pounds a year, and he has the use of a palatial house forming part of Westminster Palace. On retirement he gets a pension of four thousand pounds a year or more, with a peerage carrying a seat in the House of Lords. Although his duties, ordinarily covering but parts of five days each week for half the year, seem light in comparison with the reward, yet the abilities required are of no mean order, the isolation of his position must become very irksome, and the requirements of etiquette imposed on him by ironclad custom would in the course of time gall most men. For instance, when in the chair, he can be approached only upon matters strictly of business. He may not leave the chair unless serious cause makes it necessary. John Quincy Adams quotes of him the lines of the "Rolliad":

> There Cornwallis sits, and, oh, unhappy fate;
> Must sit forever through the long debate;
> Like sad Prometheus fastened to his rock,
> In vain he looks for pity to the clock.

Long debates have killed Speakers. Two were brought to an untimely end by a debate in Richard Cromwell's Parliament. After nine days of incessant controversy, the House sat all one night and on till 10 P.M. the next day. Mr. Chalmer Chute, the Speaker, was taken ill and died a few weeks later. Mr. Long, Recorder of London, took his place and sat for four days, when he also was taken ill and died. It was in the course of this debate that the following plaintive appeal was made: "Mr. Speaker, I perceive the House grows empty; so do our bellies. I pray you

would adjourn for an hour." It shocks our humanitarian spirits to hear that this request was not granted.[1]

When the House of Commons goes into Committee of the Whole, the regular presiding officer is the Chairman of the Committee on Ways and Means, who for that reason is commonly called the Chairman of Committees. Like the Speaker, upon appointment he withdraws from political controversies; in the House he speaks and votes nowadays only on questions relating to private bills. "Chair" comes from times when the members sat on benches and the presiding officer sat apart, on a chair. This has given us one of the synonyms for "presiding officer," and is constantly so used in legislative bodies, though, singularly enough, the title "Chairman" is never used save when the body turns itself into a Committee of the Whole. "Moderator" is now rarely used outside of New England town meetings and ecclesiastical tribunals or councils. The sedate Cushing approached a gleam of humor when after explaining that the term originally applied to one who presided in a disputation, for the purpose of restraining the contending parties from indecency and confining them to the question, he went on to say that its use for ecclesiastical tribunals was "not, perhaps, because the proceedings of such a body, more than any other, require an application of the peculiar functions of a moderator, but, probably, because it was the business of such assemblies to settle disputed points by means of forensic arguments, rather than to deliberate upon subjects or measures generally." [2]

Presiding officers on the Continent seem to stand midway the Speakers of the Commons and the speakers of our National House of Representatives, with some attributes like those of the Lord Chancellor in the House of Lords. They are not addressed in debate. They do not forego the privileges of being partisans outside the chair. They have few discretionary powers, and their indirect authority is comparatively small. Reëlection is common, provided the political complexion of the Chamber does not change. In France the presiding officer of the Assembly is consulted by the President of the Republic when new ministries are formed, and he is often called upon to take the direction of affairs as President of the Council of Ministers. It is well established that he shall not belong to any Commission, but occasionally he

[1] Percy Alden, "Great Britain's Lawmakers," *Outlook*, March 4, 1899, p. 519.
[2] L. S. Cushing, *Law and Practice of Legislative Assemblies*, 111.

attends the meetings of his Bureau and takes part in the election of the Budget Commission. In Belgium the "section centrale" that is appointed for every bill is presided over by the President or one of the Vice-Presidents of the Chamber.

In America

John Pory, who presided over the first legislative body in America, was not one of the Burgesses, as Representatives were called in Virginia. He was the Secretary of the colony, and so doubtless a member of the Council. Governor, Council, and Burgesses all sat together, and the choice of Pory was not so significant as the fact that thereafter a Burgess was always chosen to preside. Why the Governor himself did not take the chair does not appear. Elsewhere that was the early practice, but question seems to have arisen, for we find the Massachusetts General Court deeming it necessary to vote, March 3, 1635/6, that the Governor was always to be President of the Council. After the bicameral system developed, it was natural that Governors should preside over the upper branch, which was half legislative, half executive, in its functions, but even this was not to remain uncontested. In 1733, by reason of a controversy between Governor Cosby of New York and some members of the Council, the suggestion was made that he could not legally act as a member of the Council. The matter was referred to the law officers of the home Government, who decided that the Governor should not "in any case sit and vote as a member of the Council." This decision was rendered in 1735, and was duly communicated to the colonial Government. Beginning with 1736 the Governor did not sit with the Council, and that body chose its own presiding officer, who was called the Speaker. The Chief Justice was at first chosen Speaker, but, the business of the court preventing his attendance, a rule was adopted that the oldest Councillor present should preside at its sessions.[1]

One instance is recorded where a colonial Governor was chosen to preside over an assembly, that happening in the case of Governor Thomas Olive, of West Jersey, in 1684, but it was exceptional.

When the colonies began, there was still no question in England over the right of the Crown to control the appointment of Speakers, and so there was nothing strange in the fact that all

[1] C. Z. Lincoln, *Const. Hist. of New York*, I. 445.

Virginia Speakers had to be confirmed by the Governor. In Massachusetts conditions were different, for under the old charter the colonists chose their own Governor and there was no occasion to give him anything to say about the man they might select for Speaker. With the new charter and a Governor appointed by the Crown, trouble came. Judge Sewall recorded in his diary, November 21, 1693, a curious instance of attempt on the part of His Excellency to wield petty authority: "Governour bids the Deputies goe chuse a new Speaker; which they pray excuse for. Governour alledges as a reason, Speaker's adjourning their House from Friday till this day (Tuesday) without acquainting Him. By mediation the matter is compos'd, and Wednesday morn, the Governour sends to them by the Secretary, to desire them to go on with the business of the Court. Mr. Secretary is directed to enter their Acknowledgment of their Error, and asking Pardon, and that would not practise in like manner for time to come." After this episode affairs went along without much friction for some years. As a matter of form the House notified the Governor of the election of its Speaker. Presently, however, disputes led to assertion and denial of the right to negative the choice, and they became so serious that in 1725 an Explanatory Charter cleared up the mooted point by declaring that the choice must be approved by the Governor.

New Hampshire in the first of the Constitutions, the skeleton draft of January, 1776, directed that the Council which it created for an upper branch, should elect its "President"; in his absence the senior Councillor was to preside. South Carolina, beginning like New Hampshire with the choice of an upper branch out of the members of the lower, directed that each should choose its Speaker, but in the better considered Constitution of two years later "President of the Senate" appears. Virginia Constitutions used the word "Speaker" for both branches until 1850. New Jersey began with having the Council and Assembly elect the Governor, and he was to be "constant President of the Council"; that body by itself elected a "Vice-President," virtually a Lieutenant-Governor, who should preside in the absence of the Governor. Maryland directed the Senate to elect its head and styled him "President." The North Carolina Senate and House of Commons were each to elect a "Speaker," and the Constitution of that State still refers to "a Speaker (pro-tempore)," although elsewhere directing the election of a "President" to act

in the absence of the Lieutenant-Governor. New York provided a Lieutenant-Governor at the outset and made him President of the Senate. "Speaker" as a name for the head of the Senate appears next in the Constitution of Kentucky, and survived until 1890. It is still found in the Constitution of Tennessee. Elsewhere "President" is now, as far as I observe, the universal term.

The Articles of Confederation in 1778 said that the United States in Congress assembled should have authority to appoint one of their number to preside: provided, that no person should be allowed to serve in the office of President more than one year in any term of three years. When the Federal Constitution was formed, the Vice-President of the United States was made its presiding officer. This was one of the reasons that led Elbridge Gerry to withhold his signature. The result showed that his apprehensions on this score were not wholly unreasonable. The first Vice-President, L. G. McConachie thinks, was not an ideal chairman.[1] The second was not in political touch with a majority of those over whom he presided. The third was a disappointed Presidential candidate, irregular in attendance, taking his seat with indictments for murder hanging over his head. The fourth, by testimony, indeed, of one whom he had overruled, was wanting in parliamentary perception and experience. "So on down the list," says McConachie, "there is more of the unsatisfactory than of the satisfactory. The man who stands out preëminently as embodying the weakness of the office, and as responsible for its long decadence after he was gone, is John C. Calhoun."

Preserving Order

The preserving of order is generally held to be a function of the presiding officer. Indeed, it is his most important function if the word "order" gets its widest scope and takes in not merely decorum, but also the orderly conduct of business in accordance with parliamentary law and the special rules of the body concerned. Not necessarily, however, does the presiding officer occupy himself with this. The Lord Chancellor, presiding over the House of Lords, if a member, has no more to do with preserving order than any other, and if he is not a member, concerns himself only with putting questions and with other matters of form. If several peers rise to speak, he does not even decide which one

[1] *Congressional Committees*, 328.

shall be heard first. If all but one do not give way, the preference is decided by vote.

Cushing thinks it was probably upon the ground of some supposed analogy between the functions of the Vice-President of the United States, as President of the Senate, and those of the Lord Chancellor, as the presiding officer of the House of Lords, that Mr. Calhoun in 1826 decided in effect that as President of the Senate, in the matter of preserving order, or of calling any member to order, for words spoken in the course of debate, he had no power upon his own authority, but only so far as it was given and regulated by the rules of the Senate. The decision occasioned great surprise, and gave rise at the time to some severe remarks. As a practical question it was in part settled, in 1828, by the adoption of a rule that "every question of order shall be decided by the President, without debate, subject to appeal to the Senate." As a question of constitutional right and duty, it is difficult to perceive any reason for doubting, when the Constitution declares expressly that the Vice-President of the United States shall be president of the Senate, that it intended to invest him with the ordinary powers of a presiding officer.[1]

To the Speaker of the House of Commons, rather than to the Lord Chancellor, we look for the traditions and precedents in these matters. Preserving order, including therein the enforcement of the law of Parliament, has been his main task. Little by little his authority has grown, the steps being marked usually by such provisions, for example, as this of 1604: "If any man speak impertinently, or beside the question in hand, it stands with the orders of the House for the Speaker to interrupt him, and to have the pleasure of the House, whether they will further hear him." The accessions to his power that came along with the closure a generation and more ago have made him now almost an autocrat. His rulings are in effect final. They cannot at the moment be even discussed on the floor. The only way to contest them is by a motion made at another time after due notice, and of course this makes it next to impossible to avoid the effect of the ruling questioned. The member who shows disrespect for a ruling may be punished by suspension for one, two, or even four weeks. The slightest reflection in the House upon the Speaker's action or character is a grave breach of order, receiving immediate and serious reproof.

[1] L. S. Cushing, *Law and Practice of Legislative Assemblies*, 111, 112.

In marked contrast is the relation between an American House and its Speaker. There is no impropriety in appealing from his rulings and arguing their error. Sometimes, though not often, he is criticized to his face, and though that commonly is both bad judgment and bad taste, it is with us no violation of order. For the most part our Speakers command respect and confidence, but we have on occasion visited them with contumely. In the Georgia "Colonial Records" may be found (XIII, 100,101) a delightful account of the rude handling of a presiding officer by a provincial Legislature. It is in the Speaker's own language, with a detail of indignity that need not here be set forth. The Governor had sent a message ordering the Speaker to adjourn the House. As he started to rise, one of the members seized the message while it was in the Speaker's hand, and a struggle followed for its possession. Fearing it would be torn, the Speaker decided to treat the House as adjourned anyhow. But the members would not let him leave the chair. They said they would keep him there till midnight unless the business in hand was finished. "Many times afterwards," writes the mortified Speaker, "I rose in order to leave the chair and told them over and over that I could not set or Act longer that we was no sitting Assembly that everything must be void that we did, but was always Obliged to set down again." Although that capital "O" in "Obliged" was after the fashion of the time, we may imagine it as emphasizing the peremptory nature of the obligation, doubtless corporal in its application. "In a Commanding and Peremptory manner" they compelled the poor man to sign an address to His Excellency, "intirely Contrary" to his inclinations, he "Publickly" declared.

It is to be inferred that the contumacy of a presiding officer led to a singular provision in the Constitution of Minnesota (1857): "Any presiding officer refusing to sign a bill which shall have previously passed both Houses shall thereafter be incapable of holding a seat in either branch of the Legislature, or hold any other office of honor or profit in the State, and in case of such refusal each House shall, by rule, provide the manner in which such bill shall be properly certified for presentation to the Governor."

No longer ago than 1894, when Lieutenant-Governor Sheehan had refused to put the question as ordered by a majority of the New York Senate, that body held he had thereby abdicated his

position for the time, and the question was put by the leader of the majority. The New York Constitution of 1894, on account of these proceedings, ordains that the temporary President of the Senate shall preside "in the absence of the Lieutenant-Governor, or when he shall refuse to act as President or shall act as Governor." [1] The Senator who thus put the question was chosen by the people to the position of Lieutenant-Governor that same year.

It is to be emphasized that such occurrences are the exception and not the rule. They show us what may happen in extremities. Ordinarily Speakers have been men greatly respected, and sometimes beloved — such a man as Governor Hutchinson tells us was John Burrill, of Lynn, Speaker of the Massachusetts House for many years before 1720. Hutchinson says the House was as fond of this Mr. Burrill as of their eyes. "His temperate spirit, until now, had engaged the whole House in his favor, and from year to year procured him a general vote. . . . I have often heard his contemporaries applaud him for his great integrity, his acquaintance with parliamentary forms, the dignity and authority with which he filled the chair, the order and decorum he maintained in the debates of the House, his self-denial in remaining in the House, from year to year, when he might have been chosen into the Council, and saw others, who called him their father, sent there before him." [2] Virginia must have had an equally popular Speaker in the person of John Robinson, who presided over the House of Burgesses from 1738 to 1766.

Much abuse from the misinformed has been the lot of Speakers of the National House because of their exercise of power, but they too have in the main been preëminent men. Otherwise they would not have been elected. As a rule, also, they have received hearty support. Thomas B. Reed said in Congress, January 26, 1892: "I have been fifteen years in Congress, and I never saw a Speaker's decision overruled, and you will never live to see it either." He was not a good prophet, for a Speaker's decision has since then been overruled, but nevertheless the observation throws light on the confidence placed in the presiding officer. It must be admitted, though, that this is not wholly due to personal esteem and approbation. A Speaker chosen by the majority in a partisan body has the great advan-

[1] Roger Foster, *Commentaries on the Const. of the U.S.*, I, 501.
[2] *History of Massachusetts* (3d ed.), II, 212.

tage of a partisan motive for support. His adherents will never let him suffer a rebuke if they can find even a pretense for escape. With this equivocal factor in mind, one marvels that the rulings which make up so much of parliamentary law show so little of technical defect.

Share in Debate

When or how it came about that the Speaker of the House of Commons lost the privileges of other members to share in its deliberations is matter of conjecture. Doubtless it was early recognized that he was not likely to be impartial if he let himself get embroiled in debate. Anyhow, by Queen Elizabeth's time his status was established, for Sir Thomas Smith tells us: "The Speaker hath no voice in the House, nor will they not suffer him to speak in any bill to move or dissuade it. But when any bill is read, the Speaker's office is as briefly and as plainly as he may to declare the effect thereof to the House." This was because, even if the bills were printed, many of the members could not read them, for it was then no disgrace to be illiterate and there were no educational tests prescribed either by statute or by popular judgment.

Apparently the English precedent in the matter of abstention from debate by the presiding officer was not strictly followed on this side of the water. In the Provincial Assembly of New York the Speaker not only voted on all questions before the House, but also made motions from the chair. George Washington presiding over the Federal Convention of 1787, spoke only once in the whole course of its deliberations, but he did speak once, and that would indicate he had kept silent from good judgment rather than because he thought he had no right to speak. Furthermore, when the First Congress had got under way, John Adams, in the chair of the Senate, did not hesitate to talk, though he was not even made a member by the Constitution, for a presiding officer is not necessarily a member. Indeed, although the Lord Chancellor, who presides over the House of Lords, is in practice always made a peer, that is not legally necessary. The woolsack, on which he sits, is commonly said not to be within the House itself.

If John Adams had any scruples on this score, they do not seem to have kept him from addressing the Senate frequently on such matters as titles and other trifling details of punctilio and

form. The acidulous Maclay, who intensely disliked him, enters in his "Journal," May 9, 1789: "Up now got the Vice-President and for forty minutes did he harrangue us from the chair. He began first on the subject of order, and found fault with everything almost, but down he came to particulars, and pointedly blamed a member for disorderly behavior. The member had mentioned the appearance of a captious disposition in the other House. This was disorderly and spoke with asperity. The member meant was Mr. Izard."

The Speakers of the House long made no pretense of refraining from a share in its contests. Jonathan Dayton, Speaker from 1795 to 1798, conducted himself so violently in partisan debate on the floor that he was called to order by the temporary occupant of the chair. Henry Clay, who was six times chosen Speaker, let no chance pass to express his views on matters coming before the House. When in 1812 the repeal of the Non-Intercourse Act came up, instead of merely throwing his casting vote with the Nays, he took occasion to express "the pleasure he felt in having opportunity to manifest his decided opposition to the measure." Clay's biographers assert that he frequently left the chair when affairs were not going as he wished, in order that he might give a new course to proceedings. Miss Follett's careful search in the Journals and Debates, however, reveals no evidence of his speaking when the House was not in Committee of the Whole, where the Speaker has the status of a private member and may vote and speak as he pleases. There he undoubtedly exercised his influence freely. Speaker Grow was the first, as far as Miss Follett could learn, to leave the chair and take part in the business of the House when it was not in Committee of the Whole. In February of 1862 he spoke on the Homestead Bill. Since Carlisle and Reed the practice of debate by the Speaker has fallen into bad odor, as it already had in England. In the House of Commons as late as 1870 the Speaker occasionally took part in Committee debate, but that has now come to be thought inconsistent with his position of absolute impartiality.

The old theory that the Speaker was never to leave the chair in order to engage in debate, save in Committee of the Whole, brought about an interesting episode in the early days of Illinois. Governor Thomas Ford in his history of that State says that in 1821 the Legislature had under consideration the question of

chartering a State Bank that should supply ready money and help debtors. John McLean, of Shawneetown, was then the Speaker. He was opposed to the bank, and was possessed of a fertility of genius, and an overpowering eloquence, of which the bank party were justly afraid. For that reason the party in the majority in the House refused to go into Committee of the Whole, so as to allow Mr. McLean to take part in the debate. Mr. McLean, indignant at such treatment, resigned his office of Speaker, and in a speech remarkable for its ability and eloquence predicted all the evil consequences that resulted from the bank, and put in motion an opposition to the prevailing policy of crippling creditors in the collection of their debts, which prevented the repetition of such measures during that generation.

The attitude of the presiding officer of the Senate in an allied matter furnished Ford with another reminiscence. So infatuated was the Legislature with this absurd bank project that the members firmly believed the notes of the bank would remain at par with gold and silver. A resolution was passed requesting the Secretary of the Treasury of the United States to receive the notes into the land offices in payment for the public lands. When this resolution was put to vote in the Senate, the old French Lieutenant-Governor, Colonel Menard, presiding, did up the business as follows: "Gentlemen of *de* Senate, it is moved and seconded *dat de* notes of *dis* bank be made land office money. All in favor of *dat* motion, say aye; all against it, say no. It is decided in *de* affirmative. And now, gentlemen, *I bet you one hundred dollars he never be made land office money.*"

In the State Legislatures of to-day occasionally appears a rule restraining the presiding officer. For example, in the South Carolina House the Speaker "shall not enter into any debate or endeavor to influence any question before the House." In New Jersey a Senate rule stipulates that the President "shall not engage in any debate without leave of the Senate, except so far as shall be necessary for regulating the form of proceeding."

In Connecticut, Kentucky, Mississippi, Indiana, Missouri, and Texas the Lieutenant-Governor may debate in Committee of the Whole.

Share in Voting

One of three courses may be prescribed for a presiding officer in the matter of voting: (1) he may be wholly refused the vote; or

(2) he may be allowed to vote only in case of an equal division; or (3) he may be allowed to vote at pleasure.

Refusal of the vote, unless in specified cases, would doubtless be universal wherever the presiding officer is not a member. Such may be the status of the Lord Chancellor, presiding over the House of Lords, though customarily nowadays he is made a member and the question does not rise.

Permission to vote in case of an equal division is the general custom, though not universal; in Michigan, for example, the Lieutenant-Governor, presiding over the Senate, is by the Constitution forbidden to vote. Frequently it is more than permission, being strengthened into duty.

From ancient times the vote whereby the presiding officer decides in case the affirmative and negative balance has been known as "the casting vote." It is now given only when the presiding officer has not already voted, but before parliamentary law reached its present degree of definiteness, such a vote might have been his second on the matter. Under the old charter of Massachusetts Bay the Governor voted with the Assistants, and if there was an equal vote, his vote was twice counted to make it a casting vote.[1] As early as 1624 the Governor of Plymouth Colony was allowed a double voice in the council of the Assistants, and the privilege was confirmed when the laws were framed in 1636. William Penn's Charter of Liberties to Pennsylvania in 1682 provided that the Governor or his deputy should preside in the Council and have a treble voice, but the provision for the treble voice was dropped from the Frame of Government of 1683. In New York for forty-five years, after the permanent establishment of a legislative system in 1691, under the Sloughter Commission, the Governor was deemed a member of the Council, sitting with it, voting at his pleasure on any proposition, and also, as its presiding officer, giving a casting vote in case of a tie. He thus had two votes as a member of the Council; then, as Governor, he acted on each bill, and so had, or might have had in some cases, three votes.[2]

Provisions of this sort make uncertain the significance of "the casting vote" in the early assemblies. Hutchinson may be presumed to have been right about the early practice in Massachusetts, but note the language of the Body of Liberties (1641):

[1] Thomas Hutchinson, *History of Massachusetts* (3d ed.), II, 15.
[2] C. Z. Lincoln, *Const. Hist. of New York*, I, 445.

"The Governor shall have a casting voice whensoever an Equi vote shall fall out in the Court of Assistants, or generall assembly, So shall the presedent or moderator have in all Civill Courts or Assemblies." Are we to infer that "presedent" and "moderator" could vote twice if without the second vote there was a tie? Such would not be the natural inference from the phrasing in the Fundamental Orders of Connecticut (1638/9), which are supposed to have been inspired by Massachusetts custom. They read: "In which Courte the Gouvernor or Moderator shall haue power to order the Courte to giue liberty of speech, and silence vnceasonable and disorderly speakeings, to put all things to voate, and in case the vote be equall to haue the casting voice." [1] Add to the perplexity by observing the action of the Massachusetts House of Deputies, June 16, 1645: "Itt was resolved upon the quaestion by vote, that the Speaker is moderator of the Howse of Deputies, (for the time being,) & hath a castinge vote, when it falls out to be an aequivote." [2]

Why should it have been necessary to declare the Speaker a moderator? Was the casting vote a perquisite of a moderator, but not of a Speaker unless formally given to him? Apparently it did not appertain to a Governor, for when the Connecticut Charter of 1662 did not specify that he was to have the casting vote, the privilege was very soon reëstablished by law.

The practice of giving a presiding officer two votes had not become wholly obsolete when the early Constitutions were in the making. In 1784 the New Hampshire Constitution said: "The President of the State [as the Governor was at first called] shall preside in the Senate, shall have a vote equal with any other member; and shall also have a casting vote in case of a tie." This lasted until 1792, when it was directed that the Senate should appoint its President.

The first of the State Constitutions to refer to the voting power of the presiding officer in the upper branch was that of New Jersey, which made the Governor the President of the Council, with a casting vote. New York was the first to find employment for a Lieutenant-Governor by making him President of the Senate; upon an equal division, he was to "have a casting vote in their decisions, but not vote on any other occasion." This was the only State with any such provision when the Fed-

[1] *Fundamental Orders of Connecticut*, 1638/9.
[2] *Records of the Colony of the Mass. Bay, in N.E.*, III, 19.

eral Convention met, and so is to be credited with furnishing the idea to the Federal Constitution. The authors of that document preferred to give the voting power to the Vice-President by indirection, saying, he "shall have no vote, unless they be equally divided." Hamilton in No. 68 of "The Federalist" gave as the reason for adopting the New York idea: "To secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the Senator of any State from his seat as Senator, to place him in that of the President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote."

Kentucky was the next of the States to accept the principle. Her second Constitution (1799) made the Lieutenant-Governor the "Speaker" of the Senate, with a casting vote, and went farther by empowering him, "when in Committee of the Whole, to debate and vote on all subjects." Indiana (1816), Mississippi (1817), and Illinois (1818), all copied this. Connecticut (1818) took it with the omission of the power to vote in Committee of the Whole. Missouri (1820) followed the Connecticut modification, and added a casting vote in joint votes of the two Houses. Other States have adopted the system until now, in the thirty-five States that have a Lieutenant-Governor, all but one (Massachusetts) make him the presiding officer of the Senate, and in each case it is specified that he is to have the casting vote or to vote when the Senate is equally divided, except that in Michigan it is directed that he shall have no vote, and in Minnesota he is made "*ex officio* President," with nothing said about voting.

Some of the changes suggest fruits of experience. Mississippi, which abolished her Lieutenant-Governor in 1832, re-created him in 1868, with power to speak in Committee of the Whole, but not to vote there as before. Illinois in 1870 took away the power either to speak or to vote in the Committee of the Whole. Arkansas, which started without a Lieutenant-Governor, created him in 1864, with the casting vote, and in the Committee of the Whole the right to speak and vote; in 1868 the right to debate was taken away; and in 1874 the office was abolished, with a return to the Senate of the power to choose its own President. Michigan took away the casting vote in 1908, and also the right to debate in Committee of the Whole. Virginia, which in 1850 first provided for the election of the Lieutenant-Governor by the

people, made him President of the Senate without any vote, but gave the casting vote to him in 1870. Florida tried a presiding Lieutenant-Governor from 1865 to 1885 and then abolished him.

The Constitution of Rhode Island (1842) said: "The Senate shall consist of the Lieutenant-Governor and of one Senator from each city or town in the State. The Governor, and in his absence the Lieutenant-Governor, shall preside in the Senate and in grand committee. The presiding officer of the Senate and grand committee shall have a right to vote in case of equal division, but not otherwise." This gave the Lieutenant-Governor the right to vote (as well as any other rights of a member) except when presiding; then he was restricted to breaking ties. In 1909 this was amended so that the Governor might no longer preside; the Lieutenant-Governor ceased to be a member, but is to preside with the usual right to vote in case of equal division, both in the Senate and in grand committee; he also is to preside in joint assembly, but no right to vote there is specified. Apparently a President *pro tem.*, for whom provision is made, may, while serving as such, vote only in case of a tie.

The hasty reader of Constitutions would suppose that when they prescribe a casting vote for the presiding officer, it is without limitation. Not so. Take a provision like that in Michigan: "No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each House." The Lieutenant-Governor is not a member. Suppose the full membership divides evenly on a bill or joint resolution. Can the Lieutenant-Governor presiding break the tie? The Supreme Court of Michigan said "No," in Kelly *v.* Secretary of State, 149 Mich. 343 (1907). The Attorney-General argued that the Lieutenant-Governor's voting right (now taken away) was confined to the Committee of the Whole, but the court did not find it necessary to commit itself on that point. In the mind of the court it was enough that the Constitution "does not say the Lieutenant-Governor shall have a casting vote for the purpose of making laws; neither is that the necessary construction to be placed upon its language."

"The casting vote" has busied many a disputatious parliamentarian. When the votes for and against are equal, it is the rule that the negative prevails. Therefore, with the House evenly divided, the casting vote accomplishes nothing unless the presiding officer votes with the affirmative. In England it was

early demanded that he should also have the power to vote with the minority when it lacked but one vote of evenly dividing the House of Commons, so that his one vote might even the balance and thus defeat the pending question. It was argued in 1601 by Sir Edward Hobbie that in such a contingency the Speaker should vote, since for Speaker the Queen "gave us leave to chuse one out of our own number and not a stranger, a citizen of London and a member; and therefore he hath a voice." To this Sir Walter Raleigh answered, "and confirmed by the Speaker himself, that he was foreclosed of his Voice by taking that place, which it had pleased them to impose upon him; and that he was to be indifferent for both Parties: And withall shewed, that by order of the House the bill was lost." To-day unkind critics would in this country say such a presiding officer dodged.

In England the contention has not since been renewed. The Speaker of the House of Commons never votes unless there is a tie. "It is commonly said that he always gives his casting vote in such cases so as to keep the question open; but this is not strictly true. When, however, his vote involves a final decision, he bases it, not upon his personal opinion of the merits of the measure, but upon the probable intention of the House as shown by its previous action, or upon some general constitutional principle." [1]

There is no casting vote in the House of Lords. In cases of equal division the motion fails.

In the Swedish Riksdag a singular expedient is resorted to in order presumably that the President shall not be influenced by the knowledge that his vote is to have the weight of a casting vote. Printed ballots are used. Before the count the President takes a ballot, seals it, and puts it aside. If the vote is a tie, his ballot is added; otherwise it is destroyed unopened.

Such a device obviates the chief objection to the casting vote, namely, the exaggerated weight attached thereto. Of course what we think of always as the deciding vote really counts for no more than any other vote on the same side. Yet it is the habit to bestow on the man who casts it more responsibility than accrues to all his co-voters put together. The last straw that turns the scale gets the praise or blame. For the most part this is unreasonable, and yet something is to be said in palliation or excuse for our habit. The last man to vote is the only man who knows that

[1] A. L. Lowell, *The Government of England*, I, 262.

the issue depends on his judgment. Inevitably this demands of him more courage. To the onlookers, the situation brings the excitement of crisis. Doubts, hopes, and fears are to be resolved by the action of a single man. Fate hangs in the balance. In an instant the dramatic element has become supreme.

So after all it is wholly natural, however illogical, for us to attribute the decision to the casting vote. Take, for instance, the story of the resolutions that led to the impeachment of Lord Melville, April, 1805, carried only by the casting vote of the Speaker. Pitt was overcome; his friend was ruined. At the sound of the Speaker's voice the Prime Minister crushed his hat over his brows to hide the tears that coursed down his cheeks. He pushed in haste out of the House. The defeat was his last; he sank under it, and died ere many months had passed. Capping the tragic climax, the historian tells us the death of that great man was hastened by Speaker Abbot's casting vote. All the logic in the world would not satisfy us that the Speaker's vote had no more to do with the result than any other cast against Melville. The very attempt to prove it would be instinctively resented as tending to deprive us of an emotion rightfully our due.

Therefore shelving the apparatus for scientific analysis, get what pleasure you may out of some of the instances in which the Vice-President of the United States seems single-handed to have shaped the destinies of mankind. Once the fate of the Philippine Islands hung on the decision. In 1899 Vice-President Hobart voted "No" when the Senate stood 29 to 29, with 32 not voting, upon the amendment sponsored by Senator Bacon of Georgia, to the effect that it was the intention of the United States, when a stable and independent government had been erected in the islands, to transfer to it all the rights acquired from Spain and leave the government and control of the islands to their people. The Bacon amendment having been lost, the resolution of Senator McEnery of Louisiana was then adopted, 26 to 22, 42 not voting, declaring that this country would make such disposition of the island "in due time" as would "best promote the interests" of the Filipinos and the citizens of the United States. In 1916 the vote stood 41 to 41 on the amendment of which Senator Clarke of Arkansas was the author; Vice-President Marshall then voted "Yes" upon that addition, making the measure provide for full independence for the Philippines not later than

March 4, 1921. Later the bill, as amended, was passed 52 to 24, but the amendment was rejected by the House.

John C. Calhoun twice used his right to cast the determining vote as a means of defeating the will of Andrew Jackson, who was bending all his energies to make Martin Van Buren Minister to England. In all Calhoun voted twenty-eight times, and John Adams twenty-nine times, as presiding officer of the upper House. In 1846 two votes by George M. Dallas assured the passage of the Walker Tariff. In the sensational special session of 1881 Chester A. Arthur cast the votes that enabled the Republicans to organize the Senate in spite of the majority with which the Democrats began the session. In 1911 Vice-President Sherman cast three votes in a half-hour, when the Ocean Mail Subsidy Bill was under debate, and in June of that year he broke the tie when the Senate was evenly divided on an amendment leading up to the vote upon the direct election of Senators.

May a presiding officer vote on all occasions?

In this country it has been much argued that he may, if he is a member and not prohibited by any specific restraint. Cushing did not admit this. Although his argument purports to go beyond the statement that the practice has always been different, the practice seems to be the meat of the question. If a Speaker may give only a "casting vote," we have seen that he can help only the affirmative. If he may vote at any time, he can, like any other member, help either the affirmative or the negative. What his privilege as Speaker then amounts to is that he can give or withhold such help and not be censured, unless, he not having voted, the House is evenly divided, in which case he is usually expected, and often required, to go on record, effectively if he then votes with the affirmative, uselessly if he votes with the negative.

The original rule in the National House was: "In all cases of ballot by the House, the Speaker shall vote; in other cases, he shall not vote, unless the House be equally divided, or unless his vote, if given to the minority, will make the division equal, and in case of such equal division, the question shall be lost." Nevertheless, in 1792, Speaker Trumbull, with every other member, voted that Anthony Wayne had not been elected. The matter was of more consequence in 1803, when the narrow escape from catastrophe threatened by the unfortunate working of the Constitution, in the contest between Jefferson and Burr for the Pres-

idency, led to the proposal for amending the method of election. In the House 83 members voted for the resolution to amend, and 42 against, making one vote necessary for the required two thirds. Speaker Macon then had his name called and voted in the affirmative, saving the day for the amendment. He did this upon the distinct declaration that the House had no right to adopt a rule abridging the right of any member to vote. Cushing defends Macon's course on the ground that this was an extraordinary occasion, and not a common parliamentary proceeding.

In 1837 it was proposed to give the Speaker the right to vote at all times, but the attempt was not successful until 1850, when the words "he shall not vote," were changed to "he shall not be required to vote." Those who opposed this argued that it would make the Speaker more of a partisan, and less impartial. Former Speaker Robert C. Winthrop, of Massachusetts, held that if the Speaker was to vote whenever he pleased, he should also have the right to speak, in order to explain his vote. It was the privilege and right of the Speaker, according to the precedents of the House of Commons, to give his reasons when he gave his casting vote, but it had been the uniform practice of both the House of Commons and the House of Representatives that the Speaker should keep his own seat, conducting the business of the House, and not mingling in debate unless in Committee of the Whole. For one, he was in favor of maintaining that precedent.

In the rules revision of 1880 the committee reported the rule in a form requiring the Speaker to vote "in case of a tie, or where his vote, if given with the minority, would make a tie, or will make or prevent a two-thirds vote where such vote is required." To simplify, the present form was adopted: "He shall not be required to vote in ordinary legislative proceedings, except where his vote would be decisive, or where the House is engaged in voting by ballot; and in all cases of a tie vote the question shall be lost." Hinds says there seems to have been no intention of relieving the Speaker entirely from the necessity of voting, as has been the result, since under the parliamentary law a question is decided, even though the vote be a tie.

Speakers of the National House while in the chair rarely exercise their right to vote, under ordinary circumstances. Speaker Colfax in 1868 voted on the resolution for the impeachment of President Johnson, saying he could not consent that his constituents should be silent on so grave an occasion. Speaker Reed

voted on various occasions. In Committee of the Whole the Speaker has frequently voted. Lest the Speaker's vote should have undue weight, ordinarily his name is called last. Henry Clay, however, when the vote was to be taken on the Internal Improvements Bill of 1817, demanded that his name be called first, and there may have been other instances. When the matter was discussed in the 25th Congress, all agreed there was no valid reason why the Speaker's vote should be cast first, but there was difference of opinion as to whether his name should be called in regular order or last.

Vice-Presidents have in numerous instances voted in the negative when as a matter of fact their votes were not necessary to defeat the propositions. No harm has been apparent from this chance to get themselves put on record, but on the other hand, there has been no decisive benefit, and it might have been better had even this opportunity for useless partisanship been avoided by a more careful wording of the constitutional provison.

CHAPTER XX

POWER OF THE SPEAKER

One of the sources of the power of an American Speaker, where revolt has not deprived him of it, is the prerogative of appointing committees. This lets him put his friends in the desirable positions, and through a continuance of friendly relations lets him exert influence over legislation. Although it cannot be gainsaid that in some instances this has had results unfortunate enough to give reasonable excuse for changing the method of selection, yet charges of abuse of this particular power by Speakers have been greatly exaggerated and there has been regrettable failure to recognize that the evil has been sporadic. The strictures have come largely from disgruntled minority factions, from men of disappointed ambition, and from misinformed outsiders. Certain facts familiar to all members of our legislative bodies have been commonly ignored by critics. For instance, they pay no attention to the effect of the custom under which men once appointed to a committee usually stay on it as long as they wish, and are promoted on the basis of seniority. At Washington the result of this custom is that ordinarily in a new Congress not more than a third of the places on any committee are to be filled, and on the more important committees the proportion of vacancies is usually less. The same situation is found in the State Legislatures, varied according to the local habit in the matter of reëlection.

The range of preference is further limited by personal considerations. Customarily the legal committees are made up of lawyers, agricultural committees of farmers, and so on. In lower branches it is especially desirable that chairmen shall have some facility in debate, for they are supposed to be capable of explaining and defending reports. With less real justification, and yet demanded by custom, some regard is everywhere paid to geographical considerations, for it is deemed advantageous to have different regions represented on each committee. So it is fanciful to imagine that any Speaker has a free hand to indulge personal likes and dislikes, ambitions, prejudices, or whims.

It is true, however, that the Speaker can usually frame a few

of the more important committees to suit his pleasure, and this it is which has produced most of the criticism in this particular. Regrettably the criticism in not discriminating. There is misleading generalization. For example, Professor Hart says: "It is hardly to be presumed that committees made up by the Speaker will report measures of which he disapproves." [1] On the contrary, in Massachusetts the approval of the Speaker almost never gets a thought. My own experience furnishes no single instance in nine sessions where he was consulted or where he volunteered opinion. It is not in the least probable that Massachusetts is unique in this. Again, Professor Holcombe says of the Speaker: "By appointing his most trusted associates to the chairmanship of the most important committees, he determines the character of the party leadership." [2] Yet there are Legislatures where the defeated candidate for Speaker customarily receives an important chairmanship.

Lynn Haines, after fiercely castigating "the Minnesota Legislature of 1909" in his book bearing that title, named as the first of a few fundamental reforms he believed to be necessary, a change in the Constitution so that, instead of having the Lieutenant-Governor preside over the Senate, it should elect its own President. However, Mr. Haines did not contemplate that the President should appoint the committees. His grievance appeared to be that while the Lieutenant-Governor had nominally appointed, they had really been named by a political boss who was one of the Senators. The complaint is typical of much that is written about presiding officers. It neglects to explain why the remedy proposed would not result in jumping out of the frying-pan into the fire. A boss strong enough to provide for the election of a compliant Lieutenant-Governor would not have much trouble in controlling any process of committee choice short of selection by lot.

The power of recognition is another source of authority that comes in for stricture. It is charged that a Speaker can and does use it for giving the floor only to members contemplating motions agreeable to the Speaker's plans, and that thus he may determine what bills shall be considered. James G. Blaine carried the policy to the point of autocracy, requiring assurance as to the purpose for which a member sought the floor, and refusing to

[1] A. B. Hart, *Actual Government*, 134.
[2] A. N. Holcombe, *State Government in the U.S.*, 252.

recognize if the purpose did not commend itself to him. Thus he could make sure that bills were framed to meet his views, else they would not get consideration. Carlisle, who was Speaker from 1883 to 1889, also gave full scope to this prerogative of his office. The length to which he went may be illustrated by a measure pending throughout the three sessions, the Blair Educational Bill. It passed the Senate three times, but was never even voted on in the House because Mr. Carlisle would never recognize any member to take it up or fix any day for its consideration.

Another of the measures he foiled was that for repealing the internal revenue tax on tobacco. In 1885 it was believed that this might have passed the House by a combination of Democrats and Republicans if it could have been brought to a vote. In this instance the Speaker put himself on record in writing, by a reply to three prominent Democrats who made a formal written appeal that some Democrat might be recognized for the necessary suspension of the rules. Mr. Carlisle, giving what was essentially a political explanation of his belief that this measure ought not to be considered independently, definitely declared he thought it would not be proper for him to agree to such a course of action. Thereby, of course, he asserted his right thus to shape legislation. Because of this and other positions like it, Carlisle was dubbed "the premier," as his successor, Reed, was dubbed the "czar," for Mr. Reed followed with the same policy, if anything carrying it farther. For example, according to Representative Ashbel P. Fitch in the "North American Review" (Nov., 1890), "it is well known that the Tariff Bill which carries the name of Mr. McKinley would have been altered in many of its schedules if Republicans who desired changes could have had recognition and the right to speak and vote free from the fear of the displeasure of a Speaker who could and would deal out in all legislation favors to the friendly and defeat to the rebellious." Mr. Crisp refused to let a free-silver bill come to a vote in the House, because its advocates were unable to present to him a call for a necessary "rule" signed by a majority of the Democratic members.

Such use of the power of recognition, making the Speaker the arbiter between measures struggling for the right of way, was sure to be bitterly criticized. Although resentment gathered strength slowly, yet it kept on growing until in 1910 its volume

was enough to burst the dam of custom. Joseph G. Cannon was the Speaker at the time, and although he had but continued the system he found, with probably no more development of it than the increase in the pressure of business compelled, his was the misfortune to be in power as revolt came to a head, and to see his name the basis of an epithet, "Cannonism," which in the public mind described something odious.

One of the aspects of "Cannonism" to be successfully attacked was the use of the power of recognition to prevent action for which unanimous consent was necessary. The bills had become so many that of those arousing any controversy, only a small percentage could be handled, but measures to which nobody objected could get by if they had the chance. Here the Speakers had found a defense for their refusal to recognize. They said they were only exercising their right to object as members, with no more ground for criticism than if they exercised it from the floor. Mr. McCall thought it probable they had been denounced more bitterly by their fellow members, and had won a larger measure of unpopularity, on account of their failure to accord recognition in order to make request for unanimous consent for immediate consideration, than upon any other single ground.[1]

Some relief from importunity came to the Speaker when in 1909 the House adopted a rule establishing a "calendar for unanimous consent." After any bill, other than a private bill, has been favorably reported and on the House or Union calendar for three days, it is to be put on this special calendar following notice by any member. If on the reading of this calendar any measure when called is objected to, it is to be stricken from the calendar. It may be restored once, but after a second objection cannot be put on again. The device works well, speeding the passage of enough of the minor bills to make it worth while.

Greater was the rejoicing of the insurgents when in the following year they succeeded in getting a rule under which it would be possible to obtain a vote on whether a committee should be discharged from further consideration of something that had been referred to it. The rule proved unworkable, and although there is still a "Calendar of Motions to Discharge Committees," it sleeps.

At present the Speaker uses his power of recognition to no important degree save on the two days of the month (and the last

[1] *The Business of Congress*, 128.

six of a session) when motions to suspend the rules by a two-thirds vote are in order. These motions were meant to give the right of way to a few important measures that would otherwise be lost in the crush. If the initiative were to be left to the House, there would be much waste of valuable time in wrangling, with the certainty that fewer measures would be considered and the probability that those winning the opportunity would be of less consequence than some thereby sidetracked. On the whole it is better to leave the selection to the man discreet and judicious and fair enough to have been elected Speaker. Few level-headed members of Congress could be found who would say that this has not proved itself the best course for the public welfare.

Certainly abuse of such a power is possible, and no doubt it may be found in some of those State Legislatures where committees may pigeonhole bills — that is, refrain at pleasure from reporting them — or where the demoralization of limited sessions prevails, or where there is undue pressure to adjourn before the work is completed; and most of the Legislatures fall into some one or two of these classes. In such Legislatures toward the end of the session the Speaker becomes an autocrat. He may dispense preference as he pleases by recognizing this or that member for a motion to assign a committee report for consideration at an appointed hour. Commonly the House will support such a motion and so the favored measures may be arranged to take all the time that remains. Thus, though the Speaker cannot ensure success to the bills he approves, he can at any rate prevent even the consideration of those to which he is opposed. In the States that have adopted the device of a "steering committee," appointed toward the close of the session to decide what of the remaining bills shall be considered, the Speaker of the House or President of the Senate names the committee and of course can ordinarily control it if he sees fit, for naturally he appoints the men who will be guided by his judgment. Sometimes this idea is carried so far as to give the Speaker himself definite authority to determine preference. Thus, on the last day of the 1915 session of the Iowa General Assembly, the Speaker was authorized to call up such bills as he pleased, and no others could be considered without the unanimous consent of the House.

To denounce all this as necessarily and invariably bossism, tyranny, the suppression of the majority, the negation of representative government, is nonsense. To hold Speakers or

leaders personally responsible is grossly unjust. Look the facts in the face. An absurd, preposterous attempt to compel Legislatures to do within a specified time more work than can be done in that time forces choice between measures struggling for the right of way, and inevitably toward the end of the session the rivalry becomes intense. Somebody must decide. Were it not the Speaker, it would be somebody else. Whoever it may be must incur the enmity of those who are denied. It is out of the question for the House itself to decide. That would waste all the available time in wrangling. On the whole, is not the Speaker more likely to reflect the will of the majority than anybody else? And would there not be distinct loss of responsibility in substituting some other arbiter?

There is no occasion to hunt for a scapegoat. Individuals are not to blame. It is the system, and for that system the people and only the people are to be scolded. Their folly in limiting the frequency and length of legislative sessions is the real cause.

Still another opportunity for abuse of power comes from such a practice as that described by John A. Lapp, the Indiana Legislative Librarian. Says he: "When a bill is reported back from the committee the Speaker may hand it down at once or hold it indefinitely. He may hand it down when his opponents are not looking for it, and when his friends are alert. He may simply 'pigeonhole' it and there is no power to compel him to produce it. Public opinion would of course rule him somewhat, but public opinion as now organized does not play a part on more than the merest fraction of the bills." [1] Endurance of that sort of thing is incomprehensible to one familiar with the processes of a Massachusetts Legislature, where the Speaker has not the slightest power to say what shall or shall not be considered. Every report is laid before the House and goes into the calendar with the regularity of clock-work. Very rarely the Clerk may, at the Speaker's request, or even at that of a member, hold up a report for a day or two, but indefinite delay is absolutely unknown. Attempt to accomplish it would not be tolerated.

Another phase of the power to recognize presents itself in connection with the conduct of debate. Although generally confused with the use of the power to prevent any consideration whatever, it is really quite distinct, for it relates only to preference between those who would take part in discussion. The criticism of it is

[1] "Actual State Legislation," *Annals*, American Academy, Sept., 1912, 58.

not novel. Harriet Martineau, whose "Society in America" was published in 1837, said of Congress (1, 45): "There were loud and extensive complaints, last session, of the despotism of the chair in the House of Representatives, chiefly in connection with the subject of slavery. No members, it was said, were allowed a fair hearing but those who sat in a particular part of the house. If this complaint arises out of the peevishness of political disappointment, it will soon be contradicted by facts. If it is true, it is a grave injury. In either case, the chair will not long possess this power of despotism. If the favored are few, as the complaint states, the injured many will demand and obtain the power to make themselves heard in turn; and no spirit of party can long stand in the way of a claim so just."

She was not in this a good prophet. Remedy did not come in the way she predicted, and it was delayed much longer than she expected. Occasion must still have been felt in 1879, when James A. Garfield reported for the Committee on Rules: "In the nature of the case discretion must be lodged with the presiding officer, and no fixed arbitrary order of recognition can be wisely provided for in advance; and the committee are of the opinion these rules should not be changed. The practice of making a list of those who desire to speak on measures before the House or Committee of the Whole is a proper one to enable the presiding officer to know and remember the wishes of members. As to the order of recognition, he should not be bound to follow the list, but should be free to exercise a wise and just discretion in the interest of full and fair debate."

At the very outset, in 1789, the House had adopted this rule: "When two or more Members rise at once, the Speaker shall name the Member who is first to speak." It will be seen that this apparently gave the Speaker discretion to choose, rather than confined him to deciding which man actually stood first. Nevertheless the House assumed the right to question his decision and appeals were feasible for nearly a century, until in 1881 the Speaker declined to entertain such an appeal, thereby establishing a precedent which continues.

Development of the practice, whereunder in the National House the time for general debate is put almost wholly under the control of the chairman and the ranking minority member of the committee in charge of the measure under consideration, has left the Speaker or the Chairman of the Committee of the Whole lit-

tle of serious occasion to determine who shall have the floor. By custom, when the order of business brings before the House a certain bill, the Speaker must first recognize, for motions as to its disposition, the member who represents the committee that has reported the bill. If this member loses on an essential motion, the right to recognition passes to the member leading the opposition to the motion. In debate the members of the committee are entitled to priority of recognition. "Of course every egotist in the house may not intrude himself into the first place in every debate," Asher C. Hinds pithily says. "A system that permitted this would be intolerable, although it would please the egotists and would cut off one very noisy source of criticism." [1]

Custom has now also made it the duty of the presiding officer in all legislative bodies to recognize in alternation those for and against the pending proposition, in any serious debate. The propriety of this is evident, for such a course most conduces to adequate presentation of the arguments. The conditions are different from those in a trial court, where it has been found best to have all the testimony for one side presented before hearing that of the other. Debate is better treated from the point of view of argument than from that of information, and conclusions are best reached by hearing opposing views in turn.

In most of the parliamentary bodies of Continental Europe it is customary for those who want to speak to hand in their names in advance, and permission is granted in the order of application. In the British Parliament members are so much more under the control of the leaders than with us, that recognition is ordinarily not of much consequence. There the discrimination is more often based on the standing of the claimants for the floor than on political considerations. In our State Legislatures it rarely happens that time so presses as to make it inconvenient to listen to all who want to be heard, and the discretion of Speakers is not taxed. In the National House of Representatives by reason of numbers and the volume of business the matter came to be one of greater importance. The necessities of the case gave to its Speakers powers that occasionally savored of the despotic in the days before the present system of committee control was perfected.

Those who believed that the advantages of strong, capable

[1] "The Speaker in the House of Representatives," *Am. Pol. Science Review*, III, 58 (May, 1909).

leadership did not offset the evils of favoritism, prejudice, self-interest, and gross partisanship, were not without suggestion as to remedies. As early as 1847 somebody suggested that the order of speaking should be decided by lot. In 1879 as experienced a man as O. D. Conger, then serving his sixth or seventh term in the House, proposed the same remedy — the lot. Speaker Randall, while in the chair, said he had often thought it would perhaps be well that members be recognized by States, the delegation from each State, or the Chair, then to select the member from the State, so that every State could be heard in debate. As such a plan to-day would let the orators from Arizona, Delaware, Nevada, New Mexico, and Wyoming, with one representative each, be heard on every proposition, and give a New York man only one chance in forty-eight, a program of that sort is not likely to prevail.

Still another source of the Speaker's power is said to be his function of ruling, that is, of applying parliamentary law or the special rules of the assembly. The impression seems to have spread that Speakers often perform this function arbitrarily, to the gain of their friends and to the loss of their opponents. Otherwise it would hardly be classed with recognition and committee appointment as a source of personal or party advantage. Professor Hart goes so far as to allege that if committees report measures of which the Speaker disapproves, the Speaker "will almost invariably interpret the rules of the House so as to prevent anything to which he is opposed from coming to a vote." [1] Nothing of the sort ever takes place in the Massachusetts House or in Congress and I am loath to believe it is frequent elsewhere.

Anything like habitual distortion either of special rules or general parliamentary law would result in chaos, and chaos is not characteristic of our assemblies. Study of Hinds's monumental volumes of "Precedents" will disclose very few rulings in the National House, among the thousands there collected, which have a partisan flavor or suggest deviation from logic to meet the needs of the moment. Like collections to be found in some of the State legislative manuals, though they are not comprehensive, yet suffice to show a sincere attempt to accomplish the purposes of parliamentary law. It is but occasionally possible to deviate from impartiality. Now and then a Speaker may pull some rule out of oblivion for the sake of discomfiting an oppo-

[1] *Actual Government*, 134.

nent, or may take the risk of ignoring a familiar practice, but if unfairness is common, which I venture to doubt, it must for the most part be found in rulings on matters of fact.

For example, the Speaker may declare a motion for adjournment to have been carried, when the contrary was the case, and the blow with his gavel may thus summarily end a sitting against the will of the majority. So often does it prove wise to get delay in this particular manner that such arbitrary exercise of power is condoned in even the best-regulated Legislatures. No justification is to be found, however, for the perversions of fact said to be prevalent in some assemblies where voice votes are reversed at the will of the Speaker, demands for roll-calls ignored, and appeals refused. It may be that in a few Legislatures the standards of conduct are so low that such abuses are tolerated, but I am inclined to think that the number of lapses from decency has been much exaggerated by the muckrakers. In the very nature of things nearly all the decisions must be accurate. Otherwise, there would be such a mockery of fair play that long endurance of it by the community is inconceivable.

Whether or not the Speaker of the Pennsylvania House was fair on the night of April 25, 1921, will doubtless be a subject of controversy on the part of all in the throng present, as long as they remember the details of the exciting controversy that led to his undoing. The end of the session was but three days away, and if he could keep the House from getting out of the committees that evening certain bills obnoxious to his friends, these bills could not in the remaining two days be reached to avail. Filibustering carried the House beyond the hour set by the rule for adjournment, so that when the orders of the day were called for, the Speaker felt himself technically authorized to declare the House adjourned. His opponents argued, however, that inasmuch as sundry bills had by special order been set down for consideration at a later hour, the rule had thereby been superseded. Some of the members left the chamber, but a majority of the House remained and soon elected a Speaker *pro tem.*, then discharging the committees that held the bills in issue and acting upon them. The next morning the faction opposed to the Speaker, having the necessary votes, declared his office vacant and elected another man. The validity of this election can hardly be questioned, unless

on the ground that "the rump House" of the midnight before was without authority to adjourn to an hour earlier than that to which the Speaker had declared the House adjourned. More serious would be the contention that any action of the majority, after the Speaker had declared adjournment, was illegitimate.

Professor Holcombe cites the power of reference as a source of the Speaker's strength, saying that by referring important measures to committees controlled by the party leaders he may determine the fate of the measures. "Unimportant measures may be referred to the committees which from the standpoint of the 'organization' are less reliable. Committees manned by able but independent members of the party may be heavily burdened with routine business of a non-partisan character. Committees manned by less capable members may find little to do." [1] This is not impossible, but it does not take place in the well-regulated Legislatures, of which in my belief there are more than the critics suppose. Any considerable amount of such manipulation would not repay its trouble. Occasionally a bill may be diverted from its normal path by reason of ulterior and questionable motives, but it is improbable that the practice is general. It is not found in Congress.

Still another source of power to which Professor Holcombe refers is the Speaker's control of the Committee on Rules. This power, he says, does not exist in all Legislatures, and is important only in those where the Committee on Rules is highly privileged. I should go somewhat farther by extending its importance to all assemblies where the Committee on Rules is in effect the Speaker's Cabinet, as is frequently the case. Leadership is of more consequence in a legislative body than in any other form of assemblage, and apart from the technical powers of Committees on Rules, the moral effect of their organization gives a really important significance to the influence wielded through them by their controlling and impelling leader.

As a Leader

Should a Speaker be a leader?

Englishmen answered "No" and made the Speaker of the House of Commons purely and solely an impartial moderator. Americans answered "Yes" and made the Speaker of the National House of Representatives not only a moderator, but

[1] *State Government in the United States*, 236.

also the dominating head of the majority, expected to use his position, within bounds, for the benefit of his party.

It is not hard to trace the development of the American idea. In colonial times the Speaker of the Assembly was generally an active politician, the head of his party, chosen because he represented the attitude of the House toward the Governor and the Crown. The strife that preceded the Revolution emphasized this. For example, James Otis was chosen Speaker of the Massachusetts House because of his intense partisanship. In Virginia it was Peyton Randolph, Speaker, who led the opposition to Lord Dunmore. The stamp of partisanship was transferred with the office into the legislative bodies convened under the Constitutions.

Furthermore, there was theoretical justification for this in the common American view of representation. From the outset members of lower branches were supposed to be delegates of districts, and innumerable proofs could be given of the belief that should a district be unrepresented, whether by failure to elect, by death of the delegate, or from any other cause, there would be at least theoretical loss and injury. The next step in the logic was that if such a delegate is entrusted with additional duties, as when chosen Speaker, his original duties should still be performed; that is, he should vote and speak as might be necessary for the representation of his constituents. Furthermore, chosen as a partisan, to represent the political principles of the greater part of his constituents, it followed that as Speaker he was not to abandon his partisanship, but was to advance those principles as there might be chance. Rules were shaped to this end.

In Congress the system had so developed before the Civil War that Clement L. Vallandigham, of Ohio, could say on the floor of the House: "Your Speaker, whatever his natural disposition may be, is, by the necessities of his office, a despot." In the last fifth of the century three Speakers helped to make this despotism definite. Carlisle, deeming it the Speaker's duty as leader of Congress to have a legislative policy and to take every means in his power to secure its accomplishment, asserted the absolute right of recognition. Reed added the right to prevent dilatory tactics by the minority and so won the title of "Czar." Crisp greatly increased the power of the Committee on Rules.

Although Carlisle put into practice the theory that as Speaker

he should exercise his power in accordance with his individual judgment, after he had left the chair he declared that "under any system of rules that can be devised, the presiding officer in a body so numerous as the House of Representatives will necessarily have more power than ought to be entrusted to any man in this country." [1]

The next twenty years saw steady spread of the conviction that whether or not changes in the rules could enough curb the Speaker's power, yet thereby it ought to be restricted as far as possible. Although this belief was entertained by men in both parties, of course its expression came chiefly from the party happening at the moment to be in the minority in the House. It was the Democratic platform of 1908 that said: "The House of Representatives, as controlled in recent years by the Republican Party, has ceased to be a deliberative and executive body, but has come under the absolute domination of the Speaker, who has entire control of its deliberations and powers of legislation." The slur at the Republicans was a bit of manufactured political capital, for the blame really attached to Democrats just as much as to Republicans, but our political system sometimes compels these pretenses in order to get progress. The excuse is of not so much consequence as the result. In this case the result was in some measure secured two years later, when in March the Democratic minority, helped by those of the majority who were dubbed "the insurgent Republicans," stripped the Speaker of part of his power.

The more thoughtful men who took part in this contest did not believe they were ending leadership in the House; they knew they were merely shifting leadership. In the course of the debate Oscar W. Underwood, of Alabama, one of the ablest Democrats in the country, speaking, to be sure, under the conditions of a bitter partisan struggle, yet using language that to-day commends itself to the student of political science, said: "If this resolution goes through — ultimately, if not to-day — the Speaker of the House of Representatives will cease to be its leader and the Chairman of the Committee on Rules elected by this House will become the leader of the majority party in the House. It does not deprive the House of one scintilla of its power to control its business. It does not deprive it of the right of leadership, but it divorces from the Speaker the

[1] *North American Review*, March, 1890.

leadership of the House. There is no great parliamentary body in the world of which the Speaker is the leader. It is not so in the British Parliament; it is not so in the Senate of the United States. And yet those two great bodies are able to transact their business as efficiently as the House of Representatives has ever done. I say that, no matter how high or of what pure character a man may be who occupies the Speaker's chair of this House, that leader cannot divorce the leadership and the partisanship of the leader from the Speaker when he is presiding over the deliberations of this House. This great parliamentary body is entitled to a presiding officer who wields the scales of justice between man and man, between two contending political parties, and that is what we are standing for to-day." [1]

A year later another Democrat, George B. McClellan, gave the reasons why in spite of such changes leadership should and will continue. Mr. McClellan after eight years in Congress became a lecturer on political science, and his views combine experience with reflection. "It is perfectly possible," he said, "that the House may shift its leadership from the Chair to the floor, by depriving the Speaker of the political powers now connected with the office. If the House shall so decree, the impartial presiding officer, so much desired by many, may come to life, but the powers once centered in the Chair will naturally focus in the floor leader. Were the House to be led from the floor, the same outcry that is made to-day against the Speaker would be raised against the tyrant at the head of Rules or whatever chairmanship might carry the leadership, and were the leadership to be in commission, the steering committee would be abused with equal fervor. Those who object to any leadership whatever, and they are many, would only be satisfied under a condition of legislative lawlessness horrible of contemplation and impossible of realization. . . . One thing is certain, and that is that the majority will continue to govern and will continue to express its will through its chosen mouthpiece, be he Speaker, or be he floor leader. . . . As long as our institutions remain as they are, as long as we remain a self-governing Democratic Republic, the majority will continue to govern, and no thoughtful or patriotic American would have it otherwise." [2]

After a decade and more of the new system, not a few observ-

[1] *Cong. Record*, 2d Session, 61st Congress, 45, pt. 4, 3433.

[2] "Leadership in the House of Representatives," *Scribner's Mag.*, May, 1911.

ers in Washington had come to the view taken by Secretary of War John W. Weeks in an address delivered in New York, December 8, 1921. Mr. Weeks had served in House and Senate, thus bringing experience to the help of innate capacity for sound judgment. "To my mind," he said, "the change has had a tendency to weaken effective government, has resulted in irresponsible legislation, and, in time, will divide the legislative branch of government into groups, each group championing a special cause, and we will see one group combining with another to bring about a control of legislative action in the interest of a particular faction."

The changes in the rules of the National House have not reduced the Speaker to impotence, but have lessened his authority. Whether we shall progress until we reach the goal of absolute impartiality is one of the interesting problems of political science. The State Legislatures have done little with it, but here and there signs indicate that they too will presently face the question. Their needs are not yet so pressing, for they have not yet so keenly felt the effects of pressure of business as in Washington. Yet they, also, have their troubles. It is believed in many States that outside influences have altogether too much share in the choice of presiding officers, for the sake of securing the appointment of committees favorable to private interests, usually of the incorporated variety.

Two possible remedies have been suggested. In the "New England Magazine" for November, 1894, Raymond L. Bridgman, a Massachusetts State House reporter of long experience and much respected, argued at length that presiding officers should be elected by the people. This would apply to Speakers the method of choice to which we are accustomed in the matter of the Vice-President of the United States and those Lieutenant-Governors who preside in Senates. If leadership is to be the more important function of the Speaker, election by the people might be defended, but if he is to be simply an impartial moderator, it would be hard to find a worse method of choosing him. Popular election is a failure wherever technical capacity should be the prime consideration. Therein lies the great weakness of an elective system for the judiciary. Likewise administrative positions cannot be best filled by ballot. A popular electorate will not make capacity the only test, usually will not make it the chief test, and sometimes will ignore it altogether. In the choice of a

Speaker the people would pay no attention to the merits of candidates as parliamentarians, nor would they ask whether their favorite had the judicial temperament or was gifted by nature with the qualifications necessary for the control of a tumultuous assemblage. To get a good presiding officer under such a system would be as much a matter of accident as we have found it in the case of Vice-Presidents and Lieutenant-Governors.

A more promising suggestion is that the Speaker or President be chosen from outside. Francis E. Leupp, writing with intimate knowledge of Washington, said in the "Atlantic" for December, 1917: "It is within the range of possibility that the House may decide one day to have an outsider for its Speaker: there is not a word in the Constitution to forbid it, and within a dozen years the question has been quietly mooted. Concerning the President *pro tempore* of the Senate the Constitution is similarly silent; and I remember its being seriously proposed, during the Readjuster deadlock of 1881, that the Senate avert a threatened crisis by taking this officer from private life." Somebody has wisely observed that there is nothing so upsetting as a new idea, and this one will doubtless at first glance seem as ridiculous as any other, but come to think of it, there is no more reason why the Speaker should be a member, if simply a presiding officer, than why the Clerk should be a member, or the Chaplain.

Germany devised a peculiar way of recognizing that a presiding officer ought to have some fitness for presiding. To ascertain this, the Reichstag was to elect tentatively. At the opening of the session a President and two Vice-Presidents were to be chosen for a term of four weeks; then these offices were to be filled for the remainder of the session.

One of the defects of our American methods of choice lies in the electing process itself. The delays and the scandals it has produced, the waste of time and energy, the interference with the real business of legislation, the heart-burnings, the enmities, the resentments — these are too familiar a story to call for rehearsing here. However, to show that they are not the product of a degenerate age, but that our forefathers knew of them, it may be of interest to note the first order of the Virginia Assembly of 1658 / 9, reciting that, "Whereas Coll. Moore Ffantleroy, not being present in the house at the election of the speaker, moved against him as if clandestinely elected, and taxed the House of unwarrantable proceedings therein, It is ordered that the said

Coll. Ffantleroy be suspended until to-morrow morning, when, upon his submission, he may be admitted." The record says that the next morning, Coll. Ffantleroy, acknowledging his error, was readmitted, and the order for suspension raised.

Speakership contests are public misfortunes and private calamities inevitable as long as the Speakership is a stepping-stone to higher honors, and is of itself a means for the exercise of great political power. If the conditions did no more than spur honorable ambition, they would serve a useful purpose, but the concomitant evils are genuinely harmful to the public welfare and should be remedied.

A mitigating expedient is the provision that has been in the Alabama Constitution since 1867, by which Presidents of the Senate and Speakers of the House hold office until their successors are elected and qualified.

CHAPTER XXI

LEADERSHIP

LEADERSHIP is the legislative theme most prolific of fault-finding. All except those who lead, scold about leadership. Some say there is too much, some say there is too little. When there is plenty, most men prefer less. When it is scarce, most men prefer more. They rarely know just what they want, but know they do not want what they have.

Sometimes the critic will argue both ways almost in the same breath. Thus Professor James H. Hyslop, on page 42 of his book on "Democracy," tells us it is our failure to analyze the problem and to break away from the authority of Aristotle which prevents us from discovering the fundamental principle that has moved political history. Aristotle's principle of classification was not philosophical, but historical, and based the organization of government upon the number of persons who shall participate therein. "I must contend," says Hyslop, "that this is wholly false for any scientific or philosophic purposes. It is not the *quantity* of men, but the *quality* of them that determines whether we shall have good government or not." Then, on page 127, he reproaches our Legislatures because the majority maintain silence against all reason and vote submissively in obedience to a "boss," or they open their mouths only to obstruct legislation and to make a "strike." "The consequence is that our assemblies have come to the pass where they must either cease to be deliberative bodies and put themselves under the 'sovereign' power of the Speaker, a pretty pass for democracy, or place themselves at the mercy of the unscrupulous minority." There is no escape, he says, from the autocratic powers of the Speaker, and the worse tyranny of the Legislature, except the referendum. In other words, because in a Legislature *quality* controls *quantity*, there should be escape to the referendum, of which the quintessence is the quantity idea.

In our forty-eight State Legislatures may be found every shade of belief as to the importance of leadership and organization, running from Massachusetts, where it is actually obnoxious, where measures are actually endangered by the suspicion that there is

preconcerted action behind them, to States where the leader of the House, by signals given with his pencil tapped on his desk, directs the votes of his partisans. Personally, if I had to choose between either extreme, I should prefer that of Massachusetts, but why should this blind me to the rational arguments in favor of deliberately matured plans and responsible leadership?

These arguments have been advanced by many thoughtful men. It will here suffice to give the views of two of them — one the foremost English critic of governmental institutions, the other that American who, by precept and example, first as writer and teacher, then as Governor and President, has more than any other man of our day influenced thought on the deeper problems of political science.

James Bryce said in his great book on the "American Commonwealth": "A deliberative assembly is, after all, only a crowd of men; and the more intelligent a crowd is, so much the more numerous are its volitions; so much greater the difficulty of agreement. Like other crowds, a legislature must be led and ruled. Its merit lies not in the independence of its members, but in the reflex action of its opinion upon the leaders, in its willingness to defer to them in minor matters, reserving disobedience for the issues in which some great principle overrides both the obligation of deference to established authority and the respect due to special knowledge." And to the New York Bar Association in 1908 he declared: "To secure the pushing forward of measures needed in the public interest, there should be in every legislature arrangements by which some definite person or body of persons becomes responsible for the conduct of legislation."

Woodrow Wilson, writing on "Congressional Government" in 1885, observed: "We have in this country no real leadership; because no man is allowed to direct the course of Congress, and there is no way of governing the country save through Congress, which is supreme." The same thought appears in "An Old Master and other Essays" (p. 136): "We have no one in Congress who stands for the Nation. Each man stands for his part of the Nation; and so management and combination, which may be effected in the dark, are given the place that should be held by centered and responsible leadership, which would of necessity work in the focus of the national gaze." When he became President, he found that the supremacy he had accredited to Congress was not insuperable. What Congress lacked in centered

and responsible leadership, he was strong enough to supply. The doctrine he had so long preached was applied in practical result, even though no rule of Congress was changed.

It will be noticed that as far as their beliefs are disclosed by these quotations, Lord Bryce and Mr. Wilson seem to differ in that the English critic would permit revolt against leadership in matters involving great principles, but that the American critic, extolling the responsible leadership which works in the focus of the national gaze, allows us to infer he would have leadership always dominant, and held in check by responsibility. Whether or not Mr. Wilson would maintain that the leader should receive implicit and continuous obedience, at any rate such a view would be consistent with his well-known approval of the English Cabinet system, where the first refusal to obey the leader has the effect of discarding him, or at any rate of referring to the electorate the question of continuing him in power, and if the voters decide he is to go on, they show it by electing a majority that will obey. Presumably Lord Bryce would approve this, the system of his country, so that after all no radical difference between them would remain.

The prevailing American theory has been otherwise. We have held that leaders were not discredited if occasionally disobeyed. Of our fathers, many were wont to do their own thinking. Their battle for political independence was the fruit of widespread personal independence, the natural product of conditions in a land of pioneers. The struggle for liberty intensified the dread of one-man power. Liberty brought democracy in its train, and the early years of the Republic saw the aristocrat shorn of his strength. This, however, was a revolt against human nature, and in extreme form could not survive. Men may be born equal in natural rights, if such there be, but they are not born equal in natural capacities. Goethe was brutally frank but not wholly wrong when he defined a majority as "a few strong men who lead, some knaves who temporize, and the weak multitude who follow, without the faintest idea of what they want." [1]

Watch any gathering and see how instinctive and inevitable it is for much the larger part to turn to a few for counsel and direction. From all the lawmaking bodies of the world were you to pick out the one with the nearest approach to equality, would it not be the Senate of the United States? Where else

[1] *A Century of Revolution*, 187.

would you expect so much of self-reliance, independence, individuality? Yet George F. Hoar tells in his "Autobiography" (I, 195) that when Senator Edmunds left the Senate, he said the whole work of the Senate was done by six men. With Mr. Hoar we may not suppose Mr. Edmunds meant the number six to be taken literally, but it suggests the small compass of actual power that even the Senate develops.

Do not for a moment imagine such a state of affairs is due to political degeneracy. There is nothing whatever of novelty in it. James Madison, speaking in the Virginia Convention June 11, 1788, defended the competency of the Congress under the proposed Federal Constitution to lay taxes wisely, by citing the experience of the Virginia Legislature in entrusting decision to a few of its members. "Our Assembly," he said, "consists of considerably more than a hundred; yet, from the nature of the business, it devolves on a much smaller number. It is, through their sanction, approved of by all the others. It will be found that there are seldom more than ten men who rise to high information on this subject." [1] In all assemblies in all times such has been the normal situation.

Were this not the case, our American legislative system would have met with disaster long ere this. The leadership of the few has mitigated the harm threatened by rotation of membership. This has been overlooked by some of the critics. For instance, John Ordronaux says: "As the members of these Legislatures annually give place to newcomers without experience, it seems impossible not to realize the fact that, unless we believe the science of legislation to be intuitional, there is a logical necessity for concluding that ignorance and incompetency must in the majority of instances prevail over wisdom and experience." [2] That as a matter of fact this does not take place in the majority of instances is due to the leadership of the small number of men with wisdom and experience who actually control.

The real danger lies in the perversion of leadership. There is always the chance that when exaggerated into dictatorship, it will become selfish and even corrupt. Fortunately the danger breeds its own remedy. As a rule the abuse of power leads to revolt. Then the pendulum may swing toward the other extreme, which means anarchy if reached. Congress has shown itself capable

[1] *Elliot's Debates*, III, 254.
[2] *Constitutional Legislation in the U.S.*, 563.

after a fashion of checking tendencies to go too far in either direction. By the acceptance of strong leadership it got out of the helpless situation brought by the new conditions following the Civil War; and when under Speaker Cannon it seemed to be going too much the other way, the force of public opinion drove it back toward the happy mean. Some of the State Legislatures reached an absurd degree of autocracy in the widespread political demoralization accompanying the prosperity of the period following the Civil War, and a few of them remained under control of the "boss" into the present century, perhaps still are in a state of servility. Yet there is reason for belief that of late there has been a revival of legislative independence.

One of the fictions in this matter of leadership is that lawmaking assemblies are coerced, that they object to leadership, that they would revolt if they dared, that they are held in thralldom by some mysterious, highly objectionable power, working in the dark for corrupt ends. This is not true. Doubtless there are instances where strong men abuse their power in legislative halls as in all other relations of life, but as a rule assemblies are led because they want to be led, and it is by leaders whom the majority admire, respect, and trust. Speaking of the departure of Sir Edward Grey from the House of Commons, an anonymous writer in the "Fortnightly Review" for August, 1916, said: "The House of Commons will sincerely regret his absence, for he was one of its most commanding and dignified figures. He was also its master, and so far from resenting it, members gladly acknowledged in Sir Edward Grey a definite moral superiority. The idea that a representative assembly will only tolerate those who speak comfortable and flattering words is refuted by his example. It intuitively knows and admires those who, without an effort, enforce their stronger will upon their hearers coldly and imperiously. Perhaps because it is so rare, a representative body is acutely sensitive to personal distinction. That was the *forte* of Sir Edward Grey."

In essence much the same attitude toward leaders may be seen in many lawmaking bodies. Why should there be surprise or blame because members attach weight to preëminent ability, particularly when it is coupled with the experience given by long service? A score of the leading members of our National House, most of them committee chairmen or minority ranking members, have averaged to serve more than twenty years each.

Is it surprising or unwise that they should wield great influence? They came to Congress as young men and by long service learned how to lead. James G. Blaine said it was a tradition of the House that no man becomes its leader who does not enter it before he is forty.[1] This has had its exceptions, but as a rule the statesmen at Washington who because they lead are the target for the abuse of the groundlings have won their power by the long, hard effort that has fitted them for its exercise.

Leadership in Congress is much more in the hands of committee chairmen than is commonly supposed by the critics who would have us think that body dominated by some small coterie or cabal, if not by the "czar" who at the moment happens to be Speaker. James A. Garfield pointed out that no one man can any more be the leader of all the legislation of the Senate or of the House than one lawyer or one physician can now be foremost in all the departments of law or medicine.[2] Writing in 1877, he found it safe to say that the business then claiming the attention of Congress was tenfold more complex and burdensome than it had been forty years before. For example, the twelve annual appropriation bills, with their numerous details, had come to consume two thirds of each short session of the House. Forty years before, when the appropriations were made more in block, one week was enough for the work. The vast extent of our country, the increasing number of States and Territories, the legislation necessary to regulate our mineral lands, to manage our complex systems of internal revenue, banking, currency, and expenditure, had so increased the work of Congress that no one man could even read the bills and the official reports relating to current legislation, much less qualify himself for intelligent action upon them. As a necessary consequence, the real work of legislation was done by the committees; and their work had to be accepted or rejected without full knowledge of its merits. This fact alone made leadership in Congress, in the old sense of the word, impossible.

If that was the situation twoscore years and more ago, how much more preposterous to-day must be the assumption that any one man can control the lawmaking of the Nation!

Eight years after Garfield wrote, Woodrow Wilson found the leaders of the House to be the chairmen of the principal standing

[1] *Twenty Years of Congress*, II, 139.
[2] "A Century of Congress," *Atlantic Monthly*, July, 1877.

committees. "Indeed, to be exactly accurate," he said, "the House has as many leaders as there are subjects of legislation; for there are as many standing committees as there are leading classes of legislation, and in the consideration of every topic of business the House is guided by a special leader in the person of the chairman of the standing committee, charged with the superintendence of measures of the particular class to which that topic belongs."

Already, however, a new form of leadership had come into being, but so recently and so quietly that neither Mr. Wilson nor anybody else had an inkling of the stir it was to make in the political world when it reached maturity. Its creation was due to an accession of power by the Committee on Rules.

The Committee on Rules

The story of the Committee on Rules of the National House is a story of development of power, made necessary by the growth of business. It needs no argument to show that when thousands of measures are presented to a legislative body containing hundreds of members, if these measures or the reports of committees relating to them are to be considered strictly in turn, in the order of presentation, some of especial importance will be so far down on the list that they will never be reached. At first, when the members of the House were few and business was small, there was little difficulty in this particular. Gradually it became necessary to meet changing conditions. Somebody had to pick and choose. Somebody had to say what measures should be given preference in point of consideration.

For many years it sufficed to let the determination rest with the House itself, as is still the common practice in State Legislatures. By vote of the House a "special order" was made in the case of this or that measure, securing its consideration at a specified time. To this came to be added the help of the Speaker's power of recognizing a member, giving him the floor for the special purpose in view. But the day arrived when still more planning and foresight were necessary. Power of direction had to be entrusted to somebody and the Committee on Rules was the natural depositary.

There always had been a Committee on Rules. For many years it was only a select committee named at the beginning of each Congress to report a general system of rules for that partic-

ular Congress. By 1841 it had acquired duties running through the session and in that year it received authority to report from time to time. In June of 1858 the House voted for a committee of five — the Speaker and four to be appointed by him — to digest the rules and suggest amendments, for action at an early day in the next session. It is interesting to note, when a member moved to amend so that the committee should be named "by vote of the House," he alone voted for the amendment and 130 voted against it.

The report of this committee led in 1860 to the creation of a Committee on Rules, consisting of the Speaker and four appointed by him; it had leave to report at any time; and its report was to be treated as a special order. In 1883 began the practice of geniune direction by the Committee. The cause was the fact that a two-thirds vote was necessary, as it had been since 1794, to suspend the rules of the House. The Republicans had but a bare majority — could not control two thirds. So when it was apparent that a tariff bill would in ordinary course be buried in the calendar, never be reached, something had to be done. The remedy was found in a resolution from the Committee on Rules, providing that the rules should be suspended and the tariff bill made a special order. Such a resolution required only a majority vote and met the case completely.

This was too easy an expedient to be abandoned, and from that day the Committee on Rules saw its power grow, but not without remonstrance. In 1886 Abram S. Hewitt, of New York, an able member, raised a point of order against the practice. The thing had not yet become so common that without show of reason he declared it had been the custom of the House for the Committee that desired a day to come in with a resolution, submit it to the House, and take the action of the House upon it under the rules. The new method seemed to him only a device to let the Committee on Rules do that which could only be done by resolution on the request of the committee from which the application came. It was, in fact, precisely such a device, but Charles F. Crisp, of Georgia, Speaker *pro tempore,* held it to be competent for the House thus to change its rules, and saw nothing in the point of order.

Under Speaker Carlisle (1883–89) the new method of guiding business won a fixed position in the House. In the 50th Congress, Carlisle, and in the 51st Congress, Reed, appointed the Chair-

man of the Committee on Ways and Means and the Chairman of Appropriations, with the Speaker, as the majority of the Committee on Rules. The three men occupying the most powerful places in the House were thus associated, and formed a masterful steering committee.

The rules instigated by Speaker Reed and the rulings he made under them strengthened the position of the triumvirate. Of course this did not escape a share in the savage criticism by the Democrats, although when in power they had played their part in bringing to pass the very situation at which they now rebelled. When returned to power, they not only continued the "tyrannous" system, but aggravated the servitude of which they had complained. This came about as a choice between inconsistencies. If they did not strengthen the Committee on Rules, they would be compelled to see Mr. Reed, now become the minority leader, prove by filibustering tactics the need of the rules they had so bitterly denounced. So against these tactics they supplied to Speaker Crisp a weapon of defense in the shape of a new provision to the effect that the Speaker might refuse to entertain any dilatory motion following a report of the Committee on Rules. This made the position of the three majority members of the Committee well-nigh impregnable, for the House was powerless to attack their decisions or impugn their wisdom when no longer could the question of consideration be invoked. A few weak spots remained to be fortified. In 1895 Speaker Crisp ruled that the Committee on Rules had jurisdiction to report a resolution for the consideration of a measure, even though the effect be to discharge a committee from a matter pending before it. In February of 1902 the Committee on Rules reported that a bill for the repeal of the Spanish War taxes should be voted on without amendment. The purpose of this was to avoid such an amendment as that for the removal of duties on iron and steel.

The type of systematic leadership thus developed, of course became the subject of warm controversy. The member who could not persuade the leaders that his pet measure ought to have the right of way vented his disappointment in denunciation of the system. Judgment in such situations usually depends on whose ox is gored. In this case it was for a long time the Democratic ox and so blame fell on the Republicans, although as a matter of fact both parties helped develop the procedure. Logical grounds for fault-finding were not plenty, and now that time has

dispelled the partisan clouds which obscured the facts, much of the criticism seems to have been far-fetched. For example, Henry Loomis Nelson, after getting his readers in a properly hostile frame of mind by describing the leaders as "the hierarchy," went on to complain because they worked in secret, as if leaders could work in any other way. Then he charged: "The public does not know them, and party sentiment therefore cannot sustain them, because it cannot be appealed to in their behalf. They have, for the moment, at least, the power of leadership without its responsibility." [1] Inasmuch as at any moment the power of the hierarchy could have been nullified by a majority vote against them, it is not easy to see wherein there was no responsibility. To be sure, the leaders could not be deprived of their seats by a vote showing lack of confidence, as would follow in England if on going "to the country" the electorate saw fit to defeat them, but none the less was it true that the men leading the majority party in Congress could not have continued to lead if their fellow partisans chose not to follow. Speaker Cannon was right when he said "there is no rule or combination of rules in the House that can stifle the will of the majority." [2]

He was not, however, wholly ingenuous when he went on to declare: "The Committee on Rules has no power either to promote or prevent legislation. It can only recommend a rule by which the majority of the House can take up a bill, consider it, and vote upon it. It can in no way interfere with the action of the House under the rules where the great body of legislation must lie." There was no necessity thus to ignore the advantageous position in which leaders are placed, the weight that position gives their influence, and the difficulties in the way of revolt. These factors accrued to the benefit of the Committee on Rules precisely as in England they buttress the Cabinet. There was, therefore, a secondary effect of the system in the way of strengthening the general control by the leaders, of no small significance. Primarily, however, it concerned only the selection of measures for a chance of passage and the ensuring of that chance. Herein, of course, it fell far short of the English system, whereunder the Cabinet is responsible not only for the beginning but also for the ending.

Critics sometimes forget that the ensuring of the chance of

[1] "Making Laws at Washington," *Century Mag.*, June, 1902.
[2] "The Power of the Speaker," *Century Mag.*, June, 1909.

passage was one of the important results secured by the development of the Committee on Rules. Mr. McCall, indeed, lays the most stress on this. He points out that the ordinary procedure for the transaction of business in a large assembly may be employed for the purpose of preventing the transaction of any business at all, and in his opinion "the chief function of the Rules Committee is to prevent the House from becoming the slave to its own forms of procedure, and to give it the opportunity to decide upon occasion to dispense with them, or, in other words, to permit the majority at any given moment to assume control." [1]

In spite of the advantages of the system and the necessities of the situation, complaint grew. Minority members believed they were arbitrarily deprived of adequate chance to criticize. Majority members not in close touch with the leaders saw favoritism in decisions adverse to their wishes. Every man who failed to get a hearing for the private or local bill closest to his heart believed he had been unjustly treated. Sooner or later revolt was sure to come. It arrived in 1910.

The Committee on Rules could hardly be said to have made excessive use of its power in the preceding Congress. It had reported only eighteen times in the two sessions. Furthermore, the Speaker had ruled that the privilege of its reports extended only to measures relating to procedure. Yet the belief in its tyranny had gained such strength that the 61st Congress came in with a body of insurgent Republicans — the Insurgents, they were called — who were determined to curb the power exercised by the Speaker through the committee of which he was a member, which he appointed, and which he dominated. Speaker Cannon, a resourceful man of long experience, well versed in parliamentary law, succeeded for a long time in warding off Representative Norris, of Nebraska, who had prepared a resolution taking away from the Speaker the appointment of the Committee on Rules and saying he should not even be one of its members.

At last the chance for Norris came when the House refused to sustain the Speaker in a ruling against a motion of Representative Crumpacker regarding census legislation. Crumpacker's resolution was voted to be in order because the Constitution says the Congress shall by law direct the taking of a census, and subjects relating to the constitutional prerogatives of the House had always been considered as privileged. Thereupon Mr. Norris

[1] *The Business of Congress*, 53.

claimed like precedence for a motion to amend the rules, because the Constitution authorizes each House to determine its rules. Excitement flamed. Debate lasted through the night, while the regulars were trying to muster votes enough to save the Speaker.

Attempts at compromise failing, finally a recess over the next night was secured, and on the following day the Speaker ruled the Norris resolution not in order, on the strength of a precedent to the effect that from the constitutional right of the House to make its own rules did not follow a constitutional right to amend them at any time. Appeal from the ruling was met by a motion to lay the appeal on the table, and this brought the matter to a head. The Insurgents joined with the Democrats and defeated the motion. Then after the appeal had been sustained, the rules were so changed that the Committee on Rules was enlarged from five to ten members, with the Speaker left out, and the appointment was transferred to the House itself, six members from the majority and four from the minority to be named by their respective caucuses. In the following year the number was increased to eleven, now it is twelve.

The reformers believed they had put an end to dictatorship. Yet that some few men continued to guide is not to be questioned. What was really accomplished was to lessen the public knowledge of who those men were. Congressmen might know, but since 1910 the public generally has not known who should be rewarded or punished. Irresponsibility has been increased. Perhaps the party caucus has had more chance to commend or scold the men who pull the strings. Perhaps a potential insurgent has had more opportunity to air his views. The Committee on Rules is no longer the organ of the Speaker. But the benefits of the change have not been conspicuous enough to impress anybody as important.

It has never been satisfactorily demonstrated that the system, which in 1910 had been maturing for a generation, was in principle unsound, or less likely to meet with disfavor than was any other. Before the change was made, Samuel W. McCall observed that the Committee on Rules, for its special intervention upon occasions, was subject to even more rancorous abuse than is leveled at the Speaker himself. Mr. McCall believed leadership was something that could not be put in commission; it must be centered in some individual who will act, bearing the full burden of responsibility. That is the system in every great parliamentary

body in the world, he said. Even a directing Cabinet must have a leader. The political power of the Speakership might be lodged in the chairman of the Committee on Ways and Means or in some other member, but by whomsoever exercised it might be accepted as a certainty that he would not escape vituperation.[1]

Another Massachusetts Congressman seems to have been more hopeful of leadership by a committee. William H. Moody, of a judicial temperament that brought him to the Supreme Bench, gave it as his opinion in 1902 that though very likely the Committee on Rules was in a transitory stage and had not reached its full development, yet, when it should be increased in number, and made more clearly representative in its character, even greater powers would be entrusted to it, with the corresponding responsibilities; and it would prove the best method of guiding and leading the action of a body as numerous as the National House of Representatives, working under the system of government by parties.[2]

Development has not closely followed the lines that probably Mr. Moody had in mind. Although the Committee on Rules nominally guides the House, there has come into existence behind it a small "steering committee," composed of members of the majority party, and selected by the Committee on Committees named as an outcome of the organization caucus of the majority. This "steering committee" need not trouble itself with a good deal of work that devolves on the Committee on Rules, work that is routine in character, involves no party question, and is shared in by the minority members of that committee. But when a party question presents itself, or something that may be deemed of real consequence to majority interests, then the "steering committee" takes a hand. Whether sooner or later this will develop friction between the "steering committee" and the majority members of the Committee on Rules, is an interesting uncertainty.

Managing Committees

Should Congress and the Legislatures, as now seems probable, come to formal and definite acceptance of managing committees, it would be nothing new, even in this country where the system of ministerial responsibility has never gained so much as a foot-

[1] *The Business of Congress*, 144.

[2] "Constitutional Powers of the Senate," *North American Review*, March, 1902.

hold. In the Revolutionary period one at least of the new States, North Carolina, carried the idea far. There the Committee on Public Bills, or "Grand Committee," made up of the leading men in both chambers of the Assembly, first appearing in 1776, obtained such power after 1780 that Harlow thinks it really governed the State.[1] To it were referred the Governor's message and all the State papers; its reports included all the important measures on which action had to be taken; and it acquired powerful executive functions as well. It resembled the British Cabinet in the extent of its authority over the government in general, and in its influence in the Legislature in particular; it differed from the Cabinet chiefly in that its members were not made heads of executive departments.

The period saw the revival of an idea that had been applied in England two centuries before. In Queen Elizabeth's third Parliament, 1571, certain members were made "Committees for appointing such bills for the common-weal as shall be first proceeded in, and preferred before the residue, but not to reject any." D'Ewes comments on this as a rare precedent, and one that "may prove worthy of often imitation"; but it seems not to have been followed, although its basic principle came in time to be a function of the Cabinet.

On this side of the water, before or in the course of the Revolutionary troubles, New Hampshire, Massachusetts, Pennsylvania, South Carolina, and Georgia created what for want of a better name Harlow calls committees on legislation. They were not standing committees, but select, in some cases were joint, in others were composed of House members only. According to the resolutions adopted at the time of their appointment, these committees were expected to draw up and lay before the Assembly an outline of the work to be done during the session. They would make out lists of bills that in their opinion ought to become laws, and also call to the attention of the Legislature other matters concerning which action was desirable. The duties of the committees were practically the same in all the States. In New Hampshire, for instance, the committee was ordered "to examine and see what laws of a public nature would be beneficial to be passed." In Massachusetts it was appointed to consider and report on the business that ought to come before the General Court, and in Pennsylvania to report to the House "what laws

[1] *Legislative Methods in the Period Before 1825*, 84.

it will be most immediately necessary should be passed at this session." In fact, the order of any one Assembly to its legislation committee might equally well have applied to all.[1]

Except in North Carolina these committees never advanced beyond the starting-point. In some States they lived along, playing a small part from session to session; in others they quietly dropped out of use. In New Hampshire after the reorganization of the government in 1784, the importance of the committee declined, and its reports were no longer entered in the Journal. In Pennsylvania it was appointed only a few times, because there the President and Council were directed to do such work. In South Carolina it disappeared before 1790.

Now comes demand for revival of the idea. For instance, Professor J. W. Garner, of the University of Illinois, told the American Political Science Association at its meeting December, 1913–January, 1914: "There must be some single smaller body for examining, sifting, and choosing from among the enormous mass of bills with which Congress is now almost continually overwhelmed, and for steering through the House the measures for which there is a real need." [2] Elwood Mead in the "Independent," January 8, 1917, declared it a weakness in our legislation that there is no centralized authority for directing the business of the session. He wanted "a centralized, responsible authority, like the Cabinet of the British Government or of Canada, which will determine what laws are to be considered, and cast aside without mercy the mass of trivial and irrelevant bills that now discredit our legislative records and are such a dangerous nuisance to the business in this country."

Ernest Bruncken, arguing to much the same effect in the "American Political Science Review" of May, 1909, varied the remedial agency somewhat. Holding that open and official leadership is required in the Legislatures to counteract the influence of the corporation-serving bosses, he went on to suggest: "In every Legislature there are a number of men whom everybody recognizes as more efficient and influential than the rest. Why should not these be gathered into a committee to which every bill must be submitted before it is put on final passage? In this way they could prevent the adoption of bills conflicting in form or purpose. They could develop a real, consistent legislative policy

[1] *Legislative Methods in the Period Before 1825*, 80.
[2] *Proceedings*, 182.

By officially recognizing their position the power of these men would be made less irresponsible, and the probability of their being dominated by secret, outside influences would be greatly diminished. Such a committee would perform many of the regulating and unifying functions of 'The Government' in Great Britain, while at the same time we should avoid the drawbacks of the parliamentary system."

The Legislatures show no inclination to accept such a remedy for their ills save as driven toward it by conditions. As usual they do not deliberately set out to study how their methods may be improved, but when conditions become intolerable, make reluctant and unsystematic concessions to the facts. The fore part of the sessions has not yet become irksome enough to compel a program. In some States the turmoil of the closing days has passed beyond the point of endurance. So here and there we find what are often called "sifting committees," appointed toward the end of the session, to select the most important measures and bring them forward for consideration.

Iowa experience has been typical. Germs of the sifting practice appeared there in Territorial times, but it was not developed until 1860 in the House and 1864 in the Senate. With many variations of detail from time to time, it has now become an established custom. For some time such committees were made up of the chairmen of all standing committees, and then of members selected from the chairmen. Of late in each branch the committee has had seven members, not confined to chairmen. The Montana rules provide for the appointment of a joint steering committee, of five members from each branch, which after the fortieth day shall fix the order of consideration. In Nebraska the Senate may elect a "sifting committee" of seven, who may report such bills as are deemed most important for consideration, these to have precedence.

By the rules of the New York Assembly its Committee on Rules has in the last ten days of the session what in practice must amount to almost complete control of the program. Any motion to change the order, thus letting a desired bill get the right of way, must be referred to the committee without debate, and its report thereon is to stand as the determination of the House, unless otherwise directed by a vote of a majority of all elected. On its own initiative the committee can shape the calendar as it thinks best, for it can report at any time, and the only

restriction is that it shall not report as a special order a matter that the House has refused to take away from a standing committee. The ten-day period of control has been abnormally extended by setting a day for adjournment earlier than anybody expected an adjournment could be had. By this ingenious device the Committee on Rules in 1911 controlled the Assembly from April to October.

In each branch of the Georgia Legislature the Committee on Rules is to arrange the calendar during the last seven legislative days of each session, and the order and manner so fixed can be changed only by a three-fourths vote in the Senate, a two-thirds vote in the House.

Other of the States have not yet recognized the procedure by legislative rule, but carry it out by means of orders or resolutions. Governor Hodges of Kansas described to the Governors' Conference of 1913 what takes place toward the close of the session in his State: "A committee on revision of the calendar is appointed. The membership of this committee is always dictated by the party leaders and they absolutely determine what bills shall be considered, and the order in which they shall be considered. This committee usually consists of three in the Senate, and five in the House, and these eight men during the last week of the session, when almost fifty per cent of the bills are passed, absolutely dictate what enactments shall comprise one half of the laws upon our statute books. The committee becomes in reality a bicameral legislature of three and five members." [1] In 1913 Oregon by joint resolution created an "advisory committee," composed of the presiding officers acting with one Senator and two members of the House. Its duty lay in "assisting the other committees in expediting legislation now before the Legislature."

Frank E. Horack, describing the committee system in Iowa, says that although a sifting committee may help somewhat to bring order out of chaos during the closing days of the session, its creation may be considered as an indictment of the committee system itself or as a perversion of legislative procedure. "In fact, there are but two explanations of the existence of a sifting committee: either the standing committees have failed to accomplish their work during the time set for the session, or the creation of a sifting committee is a part of a prearranged plan to delay matters as much as possible so that in the closing days of the session

[1] *Proceedings*, 260.

a single committee may take charge, through which the program of the leaders can be carried out with comparative ease." [1] Possibly Iowa experience has given ground for the intimation that the practice can be perverted to sinister purposes, but it may be more charitably viewed as an attempt to meet the situation produced when there is not time enough to do all that should be done. If there must be choice in the closing days of a session, the choice must be either systematic or unsystematic. Nobody could seriously contend that chance and accident should govern. Why, though, must there be any need for choice toward the close of a session? Why would it not be far better to anticipate the need — to take time by the forelock? Is there not some reason in Mr. Horack's suggestion that the sifting committee is an indictment of the committee system? If the charge be confined to the working of the system, rather than to its purpose, much is to be said in support of the criticism. Wherever custom or rule permits the continued introduction of new business, permits committees to take their time, permits reports to be made up to the closing days, inevitably there will be congestion at the end. The causes are easily eliminated. Those Legislatures that persist in perpetuating the causes have only themselves to blame if the results add to their burden of odium.

The Norwegian Storthing has a steering committee that is suggestive. It is the Committee of Selection, with twenty-three members elected by the Storthing. Its first duty is to elect eleven standing committees. It may determine the number of members of each, but the Storthing itself or its Divisions may increase the numbers of their committees or create fresh committees if occasion arises. The Committee of Selection refers measures to the committees already appointed, unless on special occasions it should be found necessary to appoint separate committees. Four weeks after the members of the Committee of Selection have been chosen, eleven of its members retire by lot, and the others retire four weeks later, so that every four weeks either eleven or twelve members are replaced by election, the retiring members, however, being eligible for reëlection. Toward the end of the session this committee consults with the other committees in order to advise what measures should in its opinion be passed at once and what might without disadvantage be postponed.[2]

[1] "The Committee System," *Statute Lawmaking in Iowa*, 546.
[2] R. Dickinson, *Foreign Parliaments*, 384.

CHAPTER XXII

PARTISANSHIP

Leadership in a lawmaking body is generally assumed to be a concomitant of partisanship. Thus Woodrow Wilson blended the two things when arguing for what he thought would produce the best results. "Looking at government from a practical and business-like, rather than from a theoretical and abstractly-ethical point of view," he said, "treating the business of government as a business, — it seems to be unquestionably and in a high degree desirable that all legislation should distinctly represent the action of parties as parties. . . . It should be desired that parties should act in distinct organizations, in accordance with avowed principles, under easily recognized leaders, in order that the voters might be able to declare by their ballots, not only their condemnation of any past policy, by withdrawing all support from the party responsible for it; but also and particularly their will as to the future administration of the government, by bringing into power a party pledged to the adoption of an acceptable policy." [1]

Mr. Wilson was discussing Congress, where policies are few, and where the range of legislation is narrow compared with that confronting any State Legislature. Measured by public interest, the problems of Congress are individually of greater importance than an equal number of State problems, but those of the State are far more numerous. If none but State issues were to divide the voters of a State into parties, there could be no approach to anything like permanence of association on a two-party basis. Almost inevitably the result would be an evershifting division into numerous factional groups. This is probably the reason why partisan alliance in the States has been based on extraneous tests, such as beliefs regarding national issues, or has been a purely artificial device, resorted to for convenience, much as boys choose up sides for a ball game. Both phases appear in American party origins. The colonists naturally split into attackers and defenders of prerogative, the Governor being the center of controversy. At the same time, if R. V. Harlow drew right conclusions from his minute study of the assemblies in the Revolutionary period,

[1] *Congressional Government*, 97–99.

the party machine developed because it was an effective instrument for getting things done. Harlow holds that "without such leadership the assemblies would degenerate into mere debating contests, with no power of constructive action." [1]

This attaches altogether too much importance to partisan organization, for it is very far from true that without party machines assemblies necessarily degenerate into mere debating contests; and it is the case that some of the wisest constructive action appears to-day in Legislatures where partisanship is little more than a fiction, maintained chiefly for campaign purposes. Better understanding of the situation will be possible if we do not assume at the outset that the leadership coming from party organization is an imperative necessity, or that Mr. Wilson was within bounds in saying it is "unquestionably and in a high degree desirable that all legislation should distinctly represent action of parties as parties." Let us rather start by the assuming that the matter is open to question, and that the contrasting lines of development have each something to be said in their behalf. Then perhaps from a study of results, conclusions can be more wisely reached.

We shall find a wide range of methods and conditions, with adjacent States at the two extremes — New York, where partisanship is magnified to the highest degree, and Massachusetts, where it is in legislative practice insignificant. Between these extremes, the other forty-six States show every shade of political habit.

New York formally recognizes partisan leadership. A rule of the Assembly reads: "The Speaker shall appoint a majority leader, who shall be a member of the Committee on Rules, and who, together with the recognized leader of the minority, shall be a member *ex officio* of all other committees of the House and entitled to the same rights and privileges as other members of said committees except the right to vote." The rules of the Senate recognize the Temporary President as the leader of the majority, and assume a minority leader. Specified seats are assigned to these leaders. Each of them allots one half of the hour of debate permitted on a report from the Committee on Rules. Each is to be *ex officio* a member of seven specified committees — the more important. The seats of the other Senators are so allotted that the parties shall sit on opposite sides of the chamber.

[1] *Legislative Methods in the Period Before 1825*, 46.

Almost nothing of this is to be found in Massachusetts. There seats are assigned in the House to three committee chairmen, but not because they are partisans. The chairman of the Committee on Rules is placed in front of the Speaker that he may be promptly recognized to make routine motions relating chiefly to procedure, and having little or no bearing on the merits of the matter under debate. The chairmen of the committees on Ways and Means and the Judiciary have specially assigned seats because they must do more talking than anybody else, and it is desirable that they shall be placed where they can be well heard, but no thought of partisanship enters into the matter. These chairmen are sometimes referred to in the newspapers as leaders, but they lead only in matters coming from their respective committees. The seats of the other members are drawn by lot with no regard whatever to party membership. The committee chairmen are, to be sure, appointed from the majority, with an occasional exception in the Senate, but party division in committee rooms is almost unknown. Sometimes there is a pretense of having a minority leader on the floor of the House, encouraged by the newspaper reporters for the sake of adding to public interest, but many of the minority take particular pleasure in flouting their alleged leader. The majority would do the same thing if anybody pretended to general leadership. It especially resents anything savoring of dictation by party leaders outside the chamber. Few things would more hurt the chances of a bill than to let it be known that it was urged by the State Committee of the majority party.

As a matter of fact, everywhere except in New York there is much less of partisanship than is commonly supposed. A. Lawrence Lowell published the results of a statistical analysis of party votes in various lawmaking bodies, in the Papers of the American Historical Association for 1901, designed to measure the influence of party upon legislation. He found that in New York alone, among the States considered, was the amount of party voting considerable. There the proportion of party votes was about 25 or 30 per cent in the Senate and 45 or 50 per cent in the Assembly. In Ohio it was about 15 per cent in the Senate and 10 per cent in the House; in Illinois, 5.5 per cent in the Senate and 12.5 per cent in the House. In Pennsylvania the maximum for either branch of the Legislature in two sessions was about 6.5 per cent and the minimum was nothing; in Massachusetts the

proportion for 1899 was about 1 per cent in the Senate and 6 per cent for the House, but this really meant a single party vote in the Senate and only three in the House. The Ohio figures are misleading, for Mr. Lowell found that the proportion of party votes on questions of legislation was only about 3 per cent. In Illinois and Pennsylvania, too, the eliminating of votes not on questions of legislation reduces the foregoing figures. The proportion of public laws enacted on which there has been a party vote is almost imperceptible, and except in New York party votes on local matters are uncommon.

These percentages would be found to vary somewhat from year to year. Occasionally something fans partisanship a little. Thus Francis C. Lowell found party lines closely drawn in the Massachusetts General Court on thirteen roll-calls out of 104 taken in 1895, and on seven out of forty-nine in 1896.[1] Very few come to my recollection as having taken place since 1900, and almost none where the parties were aligned with complete solidarity. The indications are that the tendency of late has everywhere been away from partisanship in the Legislatures, rather than toward it. As a straw take Hichborn's statement that "not once did the California Legislature of 1909 divide on a party question; nor did it have to deal with any problem that had not at one time or another been endorsed by both parties." [2]

The facts in the case will doubtless prove a great surprise to those who have been led to think that party machines dominate American legislation. Save perhaps in New York, there is no ground for the general misconception. Even in Pennsylvania, where party organization of the electorate has been carried to the extreme and where one-man leadership is the normal condition in politics, the figures prove the common belief about legislative subserviency to be false. President Lowell explains that the belief is not true, because, in the first place, the machine rarely controls more than a part of the members of the party, and in the second place, the machine meddles very little with general legislation. It knows that to attempt to dictate to its followers on general legislation would only weaken its authority over them, and hence it confines its attention to the distribution of spoils, to laws that bear upon electoral machinery, and to

[1] "Legislative Shortcomings," *Atlantic Monthly*, March, 1897.
[2] *The Story of the California Legislature of 1909*, 289.

such bills as affect directly the persons from whom it draws its revenue.[1]

It is not, however, the case that the Legislatures are in general without leadership, nor can it be said that the leadership never degenerates into bossism. Although it is probable that the objectionable features of perverted leadership have been less prevalent since the rising tide of popular discontent with existing political practices culminated in the Progressive movement of 1912, they have not disappeared. The point is that leadership is rarely now, and in our time rarely has been, a matter of party control.

Sometimes the leaders of the two parties work together, sharing the spoils. Professor Reinsch avers that such was the case in what he calls "the evil days of the Illinois legislature from 1897 to 1903." The Senate "combine" consisted of a strong group of experienced Republican Senators closely affiliated with a lesser group among the Democrats. Only one Republican Senate caucus was held in the session of 1903, that on the convict labor bill, upon which disagreement was a foregone conclusion. All the business of the Senate was managed by a steering committee consisting of five organization Senators.[2]

Episodes of this sort have strengthened the convictions of those who think that the best results are secured when the line is sharply drawn between two parties, and the majority is made clearly responsible for all legislation. Such men argue for the English system. In the House of Commons when the second reading of a measure of any consequence is moved, it is the duty of some member of the Ministry to rise, with as little delay as possible, and state whether the Ministry supports or opposes or stands neutral. Neutrality is practically the same thing as support, in its relation to responsibility, for the duty of the Ministry is as much to stop bad bills as to secure the passage of good bills, and neutrality will be held as blameworthy as consent. Contrast this with the American system under which in the great majority of instances the party leadership stands neutral without any political implication whatever. If the leadership here were expected to pass judgment on every measure large or small, if it were with us the normal thing that this judgment should prevail without

[1] *The Influence of Party upon Legislation*, Papers of the Am. Hist. Assn., vol. 1 of 1901.

[2] *American Legislatures*, 242.

question by the mass of majority members, if voting by such members on every proposal were to become automatic, if to express a differing opinion were to mean political ruin for a majority member, would service in one of our lawmaking bodies be any more attractive to self-respecting men than it is to-day?

Believers in the English theory think they find support for their views in what they deem the deplorable results when a legislative body contains representatives of a large number of parties or factions. For example, Blaine F. Moore, arguing that under such conditions a legislative body almost invariably degenerates into a mere debating society and hence legislates with difficulty, cites the Twenty-Ninth Illinois Assembly, when in the Senate there were twenty-four Republicans, nineteen Democrats, and nine Independents, Liberals, etc. In the House the Republicans had sixty-nine members, the Democrats forty-two, and there were forty-one Independents and others difficult to classify. The proceedings of the Assembly, he declares, were marked by disgraceful scenes and personal combats, and finally it adjourned with but few results to show for its labors.[1]

Much the same sort of thing appears in the Continental Parliaments with their numerous party groups. Certainly the two-party system makes for gain in this particular. If party responsibility is in fact desirable in State Legislatures, political habits that produce only two parties are to be commended. But is it clear that party responsibility is to be desired? Francis C. Lowell thought so; said it could not be had without reasonable party spirit and sufficient party discipline; and with a tone of regret, pointed out that in the Massachusetts Legislature party spirit was feeble and intermittent, and party discipline almost wanting. The legislation of each session, he thought, should have some sort of plan or program. "A legislative program does not frame itself, and it cannot be framed by common consent, for nearly all serious legislation is inevitably the object of opposition. If there is to be any program at all, it must be made by the political majority. Not all the legislation proposed would be political; much, perhaps most of it, would be quite unconnected with the issues of national politics. The English Ministry is held responsible for the passage not only of partisan measures, but of non-partisan measures needed by the country. Responsibility,

[1] *The History of Cumulative Voting and Minority Representation in Illinois*, 21.

similar in kind though less in degree, should be undertaken by the prevailing political party of any State." [1]

Over against this, set the view of A. Lawrence Lowell. "One of the most universal causes of complaint is the tendency to play party politics instead of regarding purely the welfare of the whole community," says President Lowell. "The tendency of representative assemblies to play politics exists everywhere; and, as is often the case, the outcries against it are not loudest where it is greatest, but where it is most out of place. Grand tactics in party warfare are, perhaps, displayed on the most comprehensive scale in the British House of Commons, but they excite little reprobation because the motives are obvious and rational. Party politics play a considerable part and provoke as a rule more hostile comment in the Continental assemblies with their divisions into many groups. They are prominent in Congress also, but are less fiercely condemned there than in the State Legislatures, although, save in the case of the New York Assembly, party politics are a far smaller factor in the Legislatures of the States than in Congress or in almost any other representative bodies. The reason for the severe criticism of the action of parties in American State Legislatures is its general lack of justification. The parties are divided mainly on national issues which have no connection with the ordinary legislation of the State, and hence maneuvers for party advantage are foreign to the object the Legislatures are designed to serve." [2]

In my belief President Lowell grasped the situation better than Judge Lowell.

Certain it is that the national issues on which parties are divided have no connection with the ordinary legislation of the State. Occasionally, for brief periods, parties nationally based may take opposite sides on a matter of State concern, but the division is almost always over some question of expediency rather than of principle, and sides are taken for vote-catching purposes rather than from fundamental beliefs. This it is that makes State platforms ordinarily of so little help to legislators. Only where one party so greatly preponderates that it may become a vehicle for State-wide sentiment, can it be assumed that the declarations in State conventions have real significance. Such is the situation in the Southern States, which may explain the rule of

[1] "Legislative Shortcomings," *Atlantic Monthly*, March, 1897.
[2] *Public Opinion*, 131–32.

the Texas House that "all Democratic platform demands shall have precedence in accordance with their number over all other bills on all days," with certain exceptions. Only demands which refer to certain and definite legislation are to be construed as platform demands, which would indicate that even with the degree of dominance enjoyed by one party in Texas, its abstract declarations are not thought representative enough to receive preferential treatment.

Organization

With no legitimate relation between the work to be done and the principles of national scope that have furnished the pretext for election, manifestly the partisanship of a State Legislature is purely artificial. Its defense cannot be found within itself, but must be sought in ulterior advantages. The importance of well-defined parties to the Nation seems to many strong partisans enough by itself to warrant carrying partisanship into even the most trivial of local contests. They hold that city and town organization cannot be maintained without the aid of the little rivalries that stir neighbors into contention. They argue the virtues of party promotion, from a place in the City Council, through the Legislature, to State office or to Congress. They want every step to mean party obligation. They, too, believe in responsibility, but in responsibility to party leaders rather than to the electorate.

Such doctrine is far from absurd. The theorist who scoffs at it reveals an ignorance of human nature that would make him of little account in the actual conduct of political affairs. Without organization nothing but chaos is to be expected. Organization in politics is just as useful and admirable as in religion, philanthropy, business, or any other of the social activities in which men join. If party fealty and party discipline all along the line are necessary to the most effective party organization, whatever conduces thereto has merit, however indirect its bearing. Such has been the belief of many wise statesmen. For instance, ponder the declaration of Senator George Frisbie Hoar, a high-minded, earnest, patriotic American, toward the end of a long life of public usefulness. Said he: "Whether I am right or wrong in my opinion as to the duty of acting with and adherence to party, it is the result not of emotion or attachment or excitement, but of as cool, calculating, sober, and deliberate reflection as I am able

to give to any question of conduct or duty. Many of the things I have done in this world which have been approved by other men, or have tended to give me any place in the respect of my countrymen, have been done in opposition, at the time, to the party to which I belonged. But I have made that opposition without leaving the party. In every single instance, unless the question of the Philippine Islands shall prove an exception, the party has come round, in the end, to my way of thinking. I have been able by adhering to the Republican Party to accomplish, in my humble judgment, tenfold the good that has been accomplished by men who have ten times more ability and capacity for such service, who have left the party." [1]

Granting that such loyalty to party is beneficial, granting that party organization should be protected and fostered, does it follow that municipal, county, and State conduct should be partisan for the sake of the contribution to national partisanship?

Of late the question has been much discussed. First its relation to local affairs came under scrutiny, and therein the current against partisanship has become strong. The cities have been rapidly discarding party lines, and no considerable regret follows. Their example has made men ask why the same course should not be followed in State affairs. Minnesota has embarked on the experiment. In 1912 it provided non-partisan choice for municipal officers and the judiciary. The next year it decided to add legislators to the non-partisan class, and the Legislature of 1915 was nominated and elected without regard to party affiliations. If we accept the judgment of William Anderson, of the Department of Political Science of the University of Minnesota, expressed to the Commission to Compile Information and Data for the Massachusetts Constitutional Convention, in May, 1917, the experiment, as far as relates to the choice of legislators, had not been a success. He said the best-informed opinion throughout the State seemed to be solidly against the continuance of a non-partisan Legislature. Two elections had been carried out under the law. Partisanship had developed, of a much more obnoxious variety than under the old system. Minority parties put forward candidates, usually no more in number than the places to be filled, and won more seats than previously because the vote of the majority would be divided between several candidates. Personality counted for more than principle, popular men win-

[1] *Autobiography*, I, 196.

ning without regard to their beliefs. The resulting Legislatures were without leadership, it being a case of every man for himself. Log-rolling became unusually prevalent. Appropriations were by far the greatest ever made in the State. Observers asserted that no political party would have dared put through such an increase in the tax levy, but it could not be made a party issue at the polls, nor could individual members be held responsible. The Governor is assured of no majority in a non-partisan Legislature and consequently responsibility cannot be attached to him. At elections the candidates for the Legislature generally refused to support any candidate for Governor. This had not, however, prevented non-partisan legislators from coming to the Governor with requests for patronage and support. It is a non-partisan Senate that ratifies the appointments of a partisan Governor. On the other hand, it was generally admitted that the Senate elected in 1914, and both Senate and House elected in 1916, were composed of members of a high average of ability and integrity. Some, however, ascribed this to the effect of the prohibition movement. It was predicted that secret organizations will take advantage of the system, and by means of effective organization under cover put into practice partisanship the more dangerous because lacking responsibility.

In weighing such criticisms it is to be borne in mind that two trials of any new political method do not give sufficient ground for a final judgment. Only a decade or two will furnish evidence enough. Furthermore, the test in no one State would be adequate. Local conditions and political habits may vitiate deductions from isolated experience. So for the sake of instruction if for no other reason, it may prove advantageous if the idea gets a chance for trial in some of the other States where it is urged. California, though not yet venturing to adopt it, is traveling in that direction. After the non-partisan system was adopted for the smaller cities, it was applied to San Francisco, and then to county and judicial offices. Under Governor Johnson's lead the next step was urged and in 1915 the Legislature passed a statute extending the system to all elections except those of Congressmen and the presidential electors, but upon referendum vote this was rejected by the people. However, as the non-partisan provision was but one feature of a long measure, it may not be inferred that the popular decision was based on this particular proposal.

Governor Ernest Lister of Washington in his first inaugural

address (1913) recommended non-partisan election of county and city officials, and repeated the recommendation two years later. In January of 1917 he renewed the recommendation, broadening it to cover all State officials. He believed recent elections clearly indicated the spirit of partnership, in connection with the selection of public officials, to be rapidly disappearing.

If this be true, yet it may be only a passing phenomenon. In all our political relations, from town to nation, there is less of genuine, valid partisanship to-day than at any time within the memory of any man now living. Our political distinctions are largely artificial. No sharp line of principle differentiates us. Almost does this period match the "era of good feeling" of a hundred years ago. Recall, however, that within a decade after Monroe began his second four years of harmony, Andrew Jackson was the idol of half the country, detested by the other half, and parties were aligning with ferocity hardly equaled before or since.

Had President Wilson seen fit to form a Coalition Cabinet when we entered the World War, it is not at all impossible that the partisan organization of Congress might have seen radical changes, at any rate for the time being. It is idle to speculate as to whether there would have been a non-partisan era. At most it could have been but short-lived, for the two-party idea is ingrained upon our political substance. The traditions and precedents, the customs and rules, of our National Legislature are grouped around the two-party principle. As a working hypothesis we think this principle the best yet discovered. Nothing indicates its early abandonment by Congress.

In this respect we continue in harmony with Great Britain. During the World War partisanship withered in Parliament, but at once after the peace it revived. Just before the war it had reached a vigor unexcelled, as measured by parliamentary manifestation. The chief criticisms brought out in the illuminating hearings of the Select Committee on the House of Commons Procedure in 1914 were of party discipline, dominance by the Government, suppression of the individual member. Complaint was especially made that the discussions in Parliament no longer changed votes. It was recalled that debate had been very real a century and more before. Wilberforce, speaking on the motion for Melville's impeachment, was said to have changed forty votes. Down to 1885 there was always a reasonable chance of the Oppo-

sition succeeding on details, and they did quite frequently beat the Government. Lord Robert Cecil thought the real change not that members had become mere delegates of their constituents, but that they had become mere delegates of the party organization. Mr. Balfour agreed that there had been a tightening of the bonds of discipline, though he thought it largely due to the constituencies.

Writing in the same year, H. G. Wells portrayed the situation with candor, perhaps with hyperbole. The typical elected person, Wells declared, is a smart rather than substantial lawyer, full of cheap catchwords and elaborate tricks of procedure and electioneering, professing to serve the interests of the locality that is his constituency, but actually bound hand and foot to the specialized political association, his party, which imposed on him that constituency. Arrived at the legislature, his next ambition is office, and to secure and retain office he engages in elaborate maneuvers against the opposite party, upon issues which his limited and specialized intelligence indicates as electorally effective. But being limited and specialized, he is apt to drift completely out of touch with the interests and feelings of large masses of people in the community. In Great Britain, the two political parties are both profoundly unpopular with the general intelligence, which is sincerely anxious, if it could only find a way, to get rid of both of them.[1]

The extent to which party control of Parliament goes can perhaps be best brought home to an American reader by describing a functionary almost unknown here — the party whip. To avoid misunderstandings natural to a stranger, let me give the account in the words of that authoritative writer, Sir C. P. Ilbert. The metaphor "whip," he tells us in his book on Parliament, is borrowed from the hunting-field, and its parliamentary application can be traced to Burke. In May of 1769 there was a great debate in the House of Commons on the petition against the return of Colonel Luttrell for Westminster in the place of Alderman Wilkes, who had been expelled from the House by its order. The King's Ministers made great efforts to bring their followers together from all quarters for this debate. Burke, who took part in the debate, referred to these efforts, and described how Ministers had sent for their friends to the north and to Paris, whipping them in, than which, he said, there could not be a better phrase. The

[1] *Social Forces in England and in America*, 296, 297 (1914).

phrase thus adopted and commended by Burke caught the public fancy and soon became popular. In the "Annual Register" of 1772 we find a sketch of an imaginary politician of whom it is said that "he was first a whipper-in to the Premier, and then became Premier himself." "Whipper-in" was ultimately abbreviated into "whip."

The whips are the agents through whom party machinery is used for the conduct of the business of the House. They are the eyes and ears of their party chief. It is their business to try to discern the direction in which sections of opinion are moving, to hear any mutterings of discontent, and to suggest methods for its mitigation or removal.

The Government whips are paid officials, with official titles that do not indicate their real work. The chief of them is a Secretary of the Treasury, others are junior Lords of the Treasury, and one of them often holds a post in the King's household. They have an office in Downing Street besides their official rooms at the House of Commons, and perform important duties in connection with the arrangement of the business of the House. They sketch out a forecast of the probable work of the session, or of a part of the session, estimating the time each item of work will occupy and how much time for it can be spared. The chief whip settles, under instructions from the Prime Minister, the program of Government business for each sitting of the House of Commons, and sees that the necessary notices are handed in at the table of the House. He ascertains, by communication with the whips of the other parties, what kind of opposition the items of the program are likely to encounter, and how many and which of them have a reasonable chance of being reached and disposed of before the end of the sitting. He also arranges in the same way the days on which it would be most convenient to take particular votes of supply, and how committees appointed by the House are to be constituted so as to give a fair representation to various sections and interests. These are the arrangements that are referred to when members of either of the two front benches talk of communications passing through the usual channels. It is by means of arrangements and understandings of this kind, carried on through the agency of the Government whips, that a great part of the business of the House is conducted, and the belief is that it could not be got through with in any other manner.

The whips of the other parties do not enjoy the advantage of official posts or official salaries.

One of the whips told the Select Committee on Procedure in 1914 that he thought, if it was found a member was constantly voting against his party on important questions, the fact ought to be brought to the attention of his constituents. Our inference from this may be that an English member who shows any independence exposes himself to discipline at the polls through the agency of the party servants in the House.

Most American legislators would strongly resent any such control. In our National House of late we have had whips, but they would be promptly suppressed if they undertook to carry tales back home. All we want and ask of them is that they shall incite members to be on hand at moments of party importance. Very likely they may yet develop functions of more consequence, but they will not match their English prototypes as long as the great bulk of our legislative work remains as it is to-day — nonpartisan. This, be it remembered, is a particular in which there is fundamental difference between the lawmaking institutions of the United States and those of Europe. Under ministerial responsibility, any bill may endanger the Government, may turn its members out of office. To oppose is the business, the prime purpose, of the Opposition. So inevitably the first question asked about any proposal is, not whether it is in itself wise, but whether it will help to maintain or tend to subvert an administration. In the United States the political is usually the secondary consideration if it is brought up at all. With us no party leaders will at once lose or gain places of power upon a vote adverse to the majority. Here no serious danger attaches to independence of thought and action. Personal responsibility is not eclipsed by party responsibility.

The result is that even in Congress the public welfare is for the most part the immediate rather than the ultimate consideration. In other words, the wise result is reached directly, and not through a partisan medium. Note the declaration of James W. Good, of Iowa, Chairman of the House Committee on Appropriations of the 66th Congress, after ten years of service on that committee, both when of the majority and when of the minority: "If I were to make a rough estimate of the appropriations that are actuated or controlled at all by political considerations, I would say that not one per cent of them has any party considera-

tion at all. I do not recall now a single instance during my work on the Committee on Appropriations when the party lines were drawn. I think the situation is just contrary to what the public has in mind with regard to political considerations."

The fact of the matter is that the great bulk of the work confronting Congress and Legislatures is not essentially political in the sense of being primarily concerned with governmental principles and policies. Mr. Wilson could not have appreciated this when he wrote, long before benefiting by personal experience in public office: "We must have legislation which has been definitely forecast in party programs and sanctioned by the public voice." [1] Except for the two or three issues that an electorate can and will grasp at the same time, party platforms are futilities. No thoughtful legislator feels himself bound by the make-weights thrown in to catch a few stray votes. Knowing how platforms are made, he ought not to give himself much anxiety over their decorations. Were these to be taken too seriously, then the Committee on Resolutions of a party convention would in effect become the legislating body, enacting laws with none of the benefits found in legislative halls, such as the helps of committee hearings, debates, and repeated consideration. Furthermore, if it should be attempted in a political convention to anticipate even a tithe of the work of a Legislature or Congress, unless the convention were dominated by autocrats, it would break up in confusion and discord. Success could come only with the negation of representative government.

Such arguments as there may be for partisanship in Legislatures apply with little force to Constitutional Conventions. Half-hearted recognition of this appeared in New Jersey, in 1844, when by an arrangement recommended by the members of the Legislature, in concurrence with influential persons throughout the State, delegates were elected to a Constitutional Convention from all the districts, save one, by each of the parties in equal number.[2] The Commission appointed by the Governor of New York in 1872 to prepare amendments to the Constitution was by law to be selected half from each political party. In New Jersey a Commission authorized in 1873 was to be constituted in the same way. The law providing for the Pennsylvania Convention

[1] "Responsible Government Under the Constitution," *Atlantic Monthly*, April, 1886.

[2] Mulford, *Hist. of New Jersey*, 495.

of 1873 was drawn so that the Republican majority in the State should have a small majority in the Convention. Vacancies were filled by those delegates who had been chosen on the ticket with the member whose seat had become vacant.

The act providing for the Massachusetts Convention of 1917 directed that no party designations should appear on the ballot at either the primaries or the main election. There was little attempt to thwart the spirit of the law and the Convention was as nearly a non-partisan body as our time has seen. It did not come to my notice that anybody even undertook to compute how many delegates were Republicans or Democrats. If partisanship had any influence at all on deliberations or votes, it was not apparent. Perhaps old associations or old prejudices now and then swayed the course of a few members, without their knowing it, but the truce was complete, to all practical purposes.

The result was distinctly salutary. Unbiased by considerations of party advantage, the delegates thought only of the public welfare. No time was lost in the manufacture of political capital. Yet it was interesting to note the inevitable appearance of cleavage. The predominant issue in the choice of delegates had been the Initiative and Referendum, and although by no means all were elected by reason of their views on that question, yet the majority had won their seats because in this particular they were conservative or radical. Even without this, however, I am inclined to think the Convention would naturally have split into conservative and radical groups. As it was, such groups were so nearly equal in numbers that the middle-of-the-road men held the balance of power. This reflection of the division in the community at large, following as it did a non-partisan election, was very curious, and strikingly suggestive.

The characteristics of individual temperament that thus scatter men from pole to pole in the range of tendency, are likely always to confound the theorists who dream of a state without parties. As long as men differ in respect to classes of opinions, men will group themselves. That is why it was idle for President Yuan of the newly formed Chinese Republic to decree that henceforth "no member of any political party shall be eligible for membership in Parliament." This was in response to a memorial of the Censors, who had declared that China's recently dissolved Parliament became a laughing-stock, because all its members belonged to political parties. "Among them were to be found men

who degraded the profession of letters, men who indulged in windy rhetoric, who employed money and even arms to turn the country upside down. The parties used their collective strength to influence elections and usurp power." This ingenuous candor of beginners in democracy, with the confidence that human nature can be swept aside by a presidential decree, brings a smile to the American observer of representative institutions maturely at work, but we too have our idealists who fancy men can be transformed by a stroke of the pen.

The Caucus

Leadership may crystallize in the caucus. Preliminary conference of lawmakers for agreement upon programs has been familiar in this country from the earliest times. At the very outset it was formally recognized. The Fundamental Orders of Connectiuct in 1639 provided: "It is ordered and decreed, that the deputyes thus chosen shall have power and liberty to appoynt a tyme and place of meeting togather before any Generall Courte to advise and consult of all such things as may concerne the good of the publike." As Connecticut was but an offshoot of Massachusetts, it is to be inferred that the idea was already familiar in the older colony. Traces of it are found all through the history of colonial Legislatures. They seem to have been generally accustomed thus to work out legislative programs and agree upon officers.

With the approach of the Revolution, occasion grew for secret, unofficial conferences where plans could be matured against the common enemy, the Governor, and although during the Revolution itself there was not the same reason for secrecy, a common enemy of the majority still remained in the shape of the Loyalists, and furthermore the abnormal needs of the times called for organized leadership. After the Federal Union had been formed and national parties had taken shape, partisanship developed caucuses in the Legislatures, but with nothing like the results that followed in Congress. In most of the States conditions have not encouraged legislative caucuses, and except for nomination of officers they are rarely employed. In a few States where the science of politics has been exceptionally developed, complaint of caucus domination has indicated abuse of the system. For example, we may infer there was some ground for the desire of Theodore Cuyler in the Pennsylvania Convention of 1873

that there should be added to the legislator's oath: "And that I will not submit my individual judgment or action to the decision or control of any caucus or combination of members of the Legislature in the passage of any law or resolution." At first it looked as if he would have much support, but the long and instructive debate on oaths brought the members to saner judgment, and on the vote only twenty-one approved the idea.[1]

In Massachusetts, barring the preliminary gatherings for nomination of officers, I doubt if the present generation has seen half a dozen legislative caucuses. Memory recalls but one in the years of my own experience. A well-meaning Governor, who had not himself served in the Legislature and was unfamiliar with its traditions, thought to promote harmony of action for certain honorable purposes, and on his suggestion, it was understood, one of the most high-minded men in the State secured a caucus of the majority. It did the Governor's cause more harm than good. The Representatives resented even the most unselfish attempt at control.

Surely J. R. Commons could not have been familiar with such conditions when in his book on "Proportional Representation" he resorted to the legislative caucus for proof of the need of the reform he urged. He showed that in a Legislature of a hundred members, with sixty belonging to the majority, thirty-one of them in a caucus could determine the policy of the whole body, and enact the laws of the people. "This," he declared,"is no fanciful sketch. The power of the party caucus is well known." The power may be well known, but its exercise is not well known, because taking the country through it is so rare. Probably not one State statute in a hundred, possibly not one in a thousand, is the result of a party caucus.

Professor Commons goes on to give an illustration of the use of the man of straw in the study of political science. "A man who 'bolts' the caucus," he says, "can have no influence whatever in legislation. He has measures of his own, which he wishes to see enacted into laws. These may be appropriations of money for improvements, or for State or national institutions in his own district. They may be good measures, or they may be bad. But he knows that, in order to carry them, he cannot afford to stand against the wishes of his fellow partisans on other measures. Thus every Representative is in the power of his party caucus. He

[1] *Debates of the Penn. Const. Conv. of 1873*, II, 506–47.

cannot stay out of the caucus, and when he enters he must abide by its decisions. To say that Legislatures are deliberative assemblies, under such circumstances, is ironical. They are rather war-camps." [1] Were this the common situation, it might be serious. But it is not the common situation. It is the exception, and not the rule.

Quite different has been the development in Congress from that in the Legislatures. At the outset, before national parties took shape, phenomenal harmony prevailed. In the course of the first session Fisher Ames wrote to George Richards Minot, July 8, 1789: "There is less party spirit, less of the acrimony of pride when disappointed of success, less personality, less intrigue, cabal, management, or cunning than I ever saw in a public assembly. The question of the President's power of removal seemed to kindle some sparks of faction, but they went out for want of tinder. Measures are so far from being the product of caucusing and cabal that they are not sufficiently preconcerted."[2]

The happy family did not long stay tolerant. Caucusing and cabal began as soon as jealousy of Alexander Hamilton laid the foundation for partisanship. Within a decade the caucus became familiar. By 1797 Senators were arranging the membership of committees in party conferences secretly held. When the receipt of the X Y Z letters revealed Talleyrand's duplicity, maddened Congress, and inflamed the country, according to Jefferson "the Federal members held the largest caucus they ever had, . . . and the question was proposed and debated, whether they should declare war against France, and determined in the negative." Jefferson was informed that only five more votes were needed in the caucus to bring about a declaration of war.[3]

The Federalists were to have no monopoly of caucuses. As soon as the Republicans had swept Jefferson into the Presidency and secured a good working majority in both Houses, they forthwith resorted to the device they had denounced. Said the Washington "Federalist" of February 6, 1802: "The Democrats in Congress," for so they were beginning to be called, "are adopting of late quite an economical plan of making laws. . . . All business is to be settled in caucuses before it comes before the House; and the arguments or motives be given in newspapers after-

[1] J. R. Commons, *Proportional Representation*, 82.
[2] *Works of Fisher Ames*, I, 62.
[3] Thomas Jefferson, *Anas*, January 10, 13, 1800.

wards. The federal members are to be treated as nullities." The same paper charged that the decision regarding important bills was not made in the House, but in the caucus. Bayard, a Federalist, speaking during the debate on the repeal of the act establishing the district courts, referred to the caucus, and was called to order for so doing. That was in 1802, and was apparently the first mention of the institution in the House.[1]

Of that Congress the "Statesman's Manual" says (I, 244), "its legislation was constantly swayed by party feelings and pledges, rather than according to sound reason or personal conviction." This was so marked a step beyond the previous use of the caucus that to the 8th Congress is generally accredited the maturing of the system under which the determination of national policies became the work of the congressional majority, making its decision in secret conclave.

The Federalists charged that President Jefferson himself or his henchman, William Duane, always presided over the conferences. Whether or not this was true, certain it is that the President dominated the situation. The less assertive Presidents who followed, relaxed the executive control over Congress, and when the election of John Quincy Adams put an end to harmony between the executive and legislative departments, the caucus became distinctly a legislative affair. Although since then if the President has been in accord with the majority, his advice has often had great weight, it cannot be said that we again so nearly approached the English system of executive responsibility as we approached it under Thomas Jefferson, until Woodrow Wilson became President.

After Andrew Jackson's time, the power of the caucus dwindled with the disintegration of parties. Sectional and personal interests conflicted with party discipline. Then partisanship revived with the Civil War. As an instance of its working through the caucus, the case of Charles Sumner may be cited. When Congress met in special session July 3, 1866, the Republicans held a caucus at which a resolution was adopted limiting the business of the session to removing obstructions to the reconstruction laws. Sumner attended, voted against the resolution, and after it had been adopted, declared he would not be bound thereby. Fessenden reminded him that in such case he should not have voted, that attending and participating in a caucus obligated

[1] R. V. Harlow, *Legislative Methods in the Period Before 1825*, 187.

the individual to be bound by the will of the majority in caucus. In vain did Sumner invoke his rights as a Senator; and later when he attempted to introduce into the Senate business outside the scope of the caucus resolutions, he was overruled after a sharp encounter with the leaders on the Senate floor.[1]

Writing in the following year, Louis J. Jennings, an English critic plentifully supplied with prejudice and spleen, gave caustic expression to views that have since been many times expressed. "The power of Congress," he declared, "is securely concentrated in the hands of the leaders of the dominant party of the hour, who may be so actuated by personal ambition, or other unworthy motives, as to render them altogether unsafe guides for the nation. The discussions of this conclave are carried on in secret, and the mockery of a deliberative assembly is made complete by the systematic refusal to allow of full debate upon measures of the most momentous description. They are decided upon in private caucus, for reasons which the public are not allowed to know." [2] The sneer is the more delightful when you recall that secrecy is one of the cardinal tenets of the English Cabinet. Nothing would astonish an Englishman more than to have its proceedings revealed. Yet an Englishman discovered in the secret discussions of partisans the mockery of a deliberative assembly when they happened to be conferring in Washington instead of London.

In 1885 Mr. Wilson found the caucus thoroughly entrenched. "The leader of the Senate," he said, "is the chairman of the majority caucus. Each party in the Senate finds its real, its permanent, its effective organization in its caucus, and follows the leadership, in all important parliamentary battles, of the chairman of that caucus, its organization and its leadership alike resting upon arrangements quite outside the Constitution, for which there is no better and no other sanction than human nature." [3]

Yet the domination of the Senate caucus was not to go uncontested, and in more recent years there have been several revolts against its power. The matter came up for debate in the Senate itself when in 1906 a caucus of Democratic Senators resolved against ratifying a treaty with Santo Domingo, and further resolved, "That if two thirds of this caucus shall vote in favor of

[1] H. A. McGill, *Cycl. of Am. Govt.*, 1, 232.
[2] *Eighty Years of Republican Government in the United States*, 83.
[3] *Const. Govt. in the U.S.*, 133.

the foregoing resolution, it shall be the duty of every Democratic Senator to vote against the ratification of the said treaty." This aroused the ire of Senator T. M. Patterson, of Colorado, and he presented a resolution to the Senate declaring such caucus action to be "in plain violation of the spirit and intent of the Constitution"; and going on with his reasons in detail, concluded with the declaration "that for any Senator to vote except as his judgment and sense of duty under his oath of office requires, is to degrade the high office of Senator and to assail the dignity and standing of the Senate of the United States — qualities possessed in such high degree by no other legislative body in the world."

In the speech defending this he gave these as the exceptions to the obligations of a caucus order of the Senatorial Democratic caucus: first, the caucus order does not bind when to do so would, in the opinion of the Senator, cause him to violate the Constitution; secondly, it is not obligatory when he has in advance committed himself before the public; thirdly, it is not obligatory upon him when to vote as the caucus requests would cause him to violate the instructions of his State.

Senator J. W. Bailey replied to Senator Patterson vigorously. "The Democratic caucus," he said, "has simply and only defined his duty as a Democrat, and it is for him to determine how far his duty as a Senator requires him to disregard his duty as a Democrat. Those who come here are and ought to be controlled by a devotion to certain principles, and they unite themselves with a given party because they believe that party best calculated to promote the growth, the permanence, and the success of those principles. Let us grant this, and what follows? As unerringly as night follows day, it must follow that we recognize the right of the majority to prescribe the party conduct which is to perpetuate those principles. It will never happen that the party will take any position upon which every member of it will agree, but, agreeing in the main, they must consent to waive the immaterial or infrequent differences in order to promote the accomplishment of an important and common end." [1]

The subject was again discussed in the Senate in February of 1915, at the time of the filibuster over the Ship-Purchase Bill. Senator Root, of New York, said he thought that to be bound by a caucus resolution, adopted in advance of the discussion of a

[1] *Cong. Record*, XL, pt. 3, p. 2297.

measure in the Senate itself, is to be false to the constitutional duty of Senators and is to be false to their oath of office, because in the government of the United States, under the Constitution, it is the duty of the members of the two great legislative bodies of this country to consider, to discuss, and to act, each man in accordance with his individual opinion, each man in accordance with the judgment he forms upon the arguments that are presented to the legislative body to which he belongs. "Any agreement made beforehand by which Senators of the United States bind themselves not to consider, not to keep an open mind to arguments that are made upon the merits of a measure, not to vote in accordance with their individual judgment, is a violation of their oaths, is an abandonment and a negation of the constitutional government of the United States, and is the substitution for it of an extra-constitutional and unconstitutional method of government." Burton, of Ohio, declared: "When you govern the action of a political party — I do not care whether it is the majority or the minority — by party caucus, from which the public are excluded, in which a majority or two thirds may bind the whole number, you are departing from constitutional government for party government, and party government in one of its most offensive forms."

Senator Owen, of Oklahoma, defended the caucus: "Under the system of party government, where the members of each party line up with complete solidarity on either side of the aisle — I may say with complete solidarity, because the exception is very rare — where that is the case, and where there is a caucus or conference on both sides, it comes down to a question of party government; and party government must be controlled by a majority of the members of the party. The party then becomes jointly responsible throughout the Nation for the action of the party in the Senate and House of Representatives." Gallinger, of New Hampshire, replied: "I want to say to the Senator, in all seriousness, I have been here nearly twenty-four years and have attended every conference when I have been in the city, and the Republican Party has never undertaken to bind its members to vote on any question whatever." This was supplemented by Senator Smoot, of Utah: "I simply want to add to what the Senator from New Hampshire has already stated, that not only has the Republican Party not held caucuses to bind any Senator, but in all the time I have been a Senator of the United States I

have had no President of the United States ask me to vote any way but once, and then President Taft asked me if I could see my way clear to vote for Canadian reciprocity. I told the President I could not, and that I would vote against it. . . . I think some of the worst legislation that was ever enacted in Congress has been the result of caucuses."

In the House the power of the party caucus was greatly increased by the parliamentary revolution of March, 1910, which brought the Committee on Rules under the more direct control of the majority party in caucus assembled, and thus made it possible for the caucus to determine the order in which business should be considered. The Democrats on getting control of the House promptly proceeded to govern it through the caucus. Their rules provided that the meetings should be kept secret, but that a journal of the actual proceedings should be published. Roll-calls were not to be published except on demand of one fifth of the members present. The average attendance of the Democrats in the 63d Congress for consideration of important matters was sixty-five per cent of their 291 members. When the Republicans returned to power with the 66th Congress, the influence of the caucus became almost negligible. Rarely were either the Republicans or the Democrats called together. Dictation waned.

Sincere men of ability and experience differ widely as to the balance of gains and losses from the caucus. It appears to throw the veil of secrecy over our most important public deliberations, those that really determine the most serious policies, and secrecy in affairs of public concern has always been repugnant to the American instinct. We hear much nowadays of the demand that the fierce light of publicity shall enter every nook and corner of government. Secrecy is supposed to be somehow inconsistent with pure democracy. The contention is that the people have a right to know every official act of the man who is representing them. He is not voting for himself, he is voting for the people, and they are entitled to know exactly how he votes on every question. Behind the closed door of the caucus his vote is secret, and the vote there often gives the lie direct to his public professions.[1] Defenders of the caucus retort that the system whereunder a small group of leaders determined on policies was one of secrecy too, whereupon the rejoinder of the other side is that

[1] M. Clyde Kelly, *Machine-Made Legislation*, 48.

under the old system the objectors at any rate had a chance for public hearing and common knowledge of their arguments.

Perhaps a weightier criticism is that no caucus will give to a problem the exhaustive discussion possible in the open House. Therefore the decisions of the caucus are likely to be too precipitate. This is an argument that can be met only by advancing the necessities of the case in excuse for time-saving procedure. So much work, it may be said, nowadays presses for attention that the voluminous debates of olden times are no longer practicable without serious neglect of other important business. This is true. Yet snap-shot decisions in caucus may not be the wise remedy. It is quite possible, by the English system of grand committees, or the Continental system of bureaux or sections, to secure thorough scrutiny of all proposals. Better still is the remedy of taking administrative detail — rules and regulations — away from lawmaking bodies that should concentrate their attention on broad questions of public policy.

The most serious of the objections to caucus rule, from the viewpoint of political theory, is that it tends to shut out the minority from all share in legislation. That is the result toward which the Cabinet system of England marches, and which seems to be viewed without alarm by those Americans who wish we had ministerial responsibility. They argue that criticism is the sole province of the minority. If this should be granted, if the minority, however experienced, capable, and patriotic, ought to have no constructive part, either in the committee room or the House itself, but become simply and solely the President's Opposition, as in England it is His Majesty's Opposition, yet we are hardly prudent in ignoring the great probability of the next step, the complete suppression of the minority. Already that threatens Parliament. Already its ominous cloud hangs over Congress, where now and then we see vital problems of the most serious import handled under special rules permitting preposterous limitation of debate. Will it not presently be asked — "Why any debate at all? The caucus has decided. We have the votes. Why waste time?"

Such a step would be logical. More than that, to the party in power it would be profitable. If a measure is to be passed just as a caucus has agreed upon it, debate can accrue only to the partisan advantage of the minority. The public is sure to pay more attention to the attack than to the defense. Explanations rarely

interest. It is the fault-finder who gets the public ear. Witness the prosperity of the muckraker. We love a libel.

The majority, then, has so little to gain and so much to lose by exposing its work to the shafts of the minority that sooner or later it is reasonably sure to stifle the minority if rule and custom permit. That is why he who believes in free speech, in argument, in deliberation, may well question the wisdom of the caucus system.

CHAPTER XXIII

PRINTING AND RECORDING

The Massachusetts General Court had not been in existence a dozen years, when it attested the importance to a legislative assembly of knowing just what it is acting upon, by ordering, October 7, 1641, "that henceforward nothing should bee put to vote before it bee written." [1] Furthermore, the Court evidently felt that both its dignity and its convenience called for proper documents, judging by this edifying entry of May 29, 1655: "Mr. Robert Saltonstall is fined 5 shillings for presenting his petition in so small and bad a peece of paper." [2] We may hope that the thrifty "Mr." Saltonstall thereafter was more generous and thoughtful with his stationery.

The beginnings of another of our States, Pennsylvania, show that in the seventeenth century at least one man believed it was also of importance that the people should know what laws were proposed. William Penn, in his Frame of Government (1682), provided that all the bills the Governor and Council might prepare to be passed into laws by the General Assembly should be "published and affixed to the most noted places in the inhabited parts" of the Province, "thirty days before the meeting of the General Assembly, in order to the passing them into laws or rejecting of them, as the General Assembly shall see meet." This was the honorable tradition of Pennsylvania when Benjamin Franklin, master printer, endowed with common sense beyond most Americans of his or any other time, came to preside over the Convention of 1776 for framing a Constitution. He is believed to have inspired much of that document and it is no stretch of probability to assume that he was responsible for Section 15: "To the end that the laws before they are enacted may be more maturely considered, and the inconvenience of hasty determination as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly." Among the various in-

[1] *Records of the Colony of the Mass. Bay in N.E.*, I, 339. [2] *Ibid.*, II, 76.

fractions of the Constitution pointed out by the Council of Censors at the close of its only session (November, 1783, to September, 1784) was the passing of many bills without the publication required. Presumably experience did not lead to the belief that the neglect worked harm, for when the Constitution of 1790 was framed, this provision was dropped. In the course of time, however, abuses developed by reason of lack of constitutional safeguards, leading the Convention of 1873 to revive the old requirement in a new form: "No bill shall be considered unless referred to a committee, returned therefrom, and printed for the use of members." It was also stipulated that all amendments should be printed before final vote on a bill.

This was an improvement on the provision put into the Constitution of Illinois in 1870, which required only that the bill and amendments should be printed before final passage, for that would permit leaving a measure unprinted during the debatable stages. Herein lie the variations in practice shown by the different States. Of those that have constitutional requirements in the matter, Colorado, Montana, and Wyoming follow Pennsylvania in demanding that no bill shall be considered until it has been printed. Ten others content themselves with the Illinois stipulation. Those that handle the matter by legislative rule show a wide diversity in custom. Some print bills on introduction as a matter of course. Others print bills only when "of general public interest," or when "authorized by the House," or when "favorably reported from committees." For example, in Minnesota and Georgia it is required by rule that no bill be printed until it has been favorably reported by a committee, but in Minnesota the House may order printing by a majority vote and in Georgia permission may be granted on the request of a committee. Few bills are printed in Delaware, Florida, or Mississippi.

When New York in 1894 required every bill to be printed and put on the desks of members in its final form three days before final passage, exception was unwisely permitted in case the Governor should certify to the necessity of immediate passage. The Convention of 1915 recommended abolishing this opportunity for emergency messages by the Governor, but the failure of the work of that Convention has kept the improvement from being made.

Nowadays there is no valid reason why Legislatures should not go the whole distance in securing the full benefit of printer's

ink. It may, indeed, be argued that the Massachusetts practice of printing every bill on introduction, coincident with reference to a committee, results in waste of money on scores and even hundreds of bills that have no chance of success, and occasionally furnishes an undesirable chance for propaganda at the public expense. These abuses, however, will be greatly lessened when the Legislature sees the wisdom of charging a nominal fee. Even now their total cost is an inconsiderable matter compared with the great help toward good legislation that is given by the opportunity to see in type every proposal to be considered. To attempt saving money by refusing to print everything is a penny-wise pound-foolish economy that is really parsimony.

Iowa has an unwise rule that printed bills are not to be given out to the public except to, or upon the order of, the presiding officer, a member, or a State officer. Fortunately the rule is not strictly enforced. Precisely the opposite course from that contemplated by the rule ought to be encouraged. There should be every endeavor to get printed bills into the hands of citizens interested.

Engrossing and Signing

It is probable that the chief motive for constitutional provision in the matter of printing was not to serve the convenience of members, but to ensure that the bill enacted into law shall be what it is supposed to be by those who vote on it. The chance for mistake or fraud at this stage of legislative procedure has made trouble ever since it brought about the parliamentary revolution that took from the King and his lawyers the work of phrasing the laws. It will be remembered that the practice of submitting a perfected bill to the King came into existence because of just complaint that the bills drafted in response to the petitions of Parliament did not correspond to what had been voted.

In at least one of the American colonies there was ground for like complaint. S. G. Arnold tells us, in his "History of Rhode Island" (II, 108), that the old custom there was for the Assembly to pass an act in substance, leaving it for the Clerk or Recorder to put in proper form. The inconvenience of such a loose method of procedure was felt more than once, and there is reason to believe the intention of the Assembly was sometimes misrepresented, through carelessness or design. "In one matter, at least,

which has become of historical importance, although of no practical moment at the time, the State has suffered to the present day from this inadvertence," Arnold says. He referred to the words "professing Christianity" and "Roman Catholics excepted," which he believed to have been interpolated about 1699 in the act of 1663 concerning the admittance of freemen. The danger of such happenings, together with the need that accompanied the plan of printing the laws, and the frequent requisitions from England for copies of them, compelling greater care in their composition, led to the appointment of an engrossing committee in June of 1732.

Massachusetts had made provision in the matter in 1653, the entry reading: "Mr. Bellingham, Mr. Glover, and Mr. Hill, are appointed with the secretary to peruse the laws that is past this Court, comparing them with the original copies." [1] This may have been the first record of what became the Committee on Engrossed Bills.

Engrossment, as long as practiced in Parliament, was, D'Ewes says, "no more than to transcribe the bill fairly out of the paper, in which it was written, into parchment." Its purpose was merely to make a clean copy with the amendments in their proper places on a permanent and substantial material. In Parliament it has been displaced by printing, and the process is nothing but the printing of the bill as it passes one House, to go to the other. In this country there is confusion in the use of the words "engrossment" and "enrollment." Many of the Legislatures have at the same time committees on engrossed bills and on enrolled bills. Apparently enrollment means inscribing on parchment preliminary to signature. Engrossment sometimes means that, sometimes means the preparation of the clean printed copy for further consideration. Not infrequently the original bill, if printed or if fairly written without interlineation, and not amended, may, when ordered to be engrossed for a third reading, be reported to the House as the engrossed bill.

For the most part the States have thought it enough to take precaution in these matters by means of legislative rules. New Mexico, however, has deemed it expedient to put this into her Constitution: "No interlineation or erasure in a signed bill shall be effective unless certified thereon in express terms by the presiding officer of each House quoting the words interlined or

[1] *Records of the Colony of the Mass. Bay in N.E.*, IV, pt. I, p. 149.

erased, nor unless the fact of the making of such interlineation or erasure be publicly announced in each House and entered on the Journal. Any person who shall, without lawful authority, materially change or alter, or make away with, any bill pending in or passed by the Legislature, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years."

Missouri, in 1875, had approached the danger from another angle. Requiring that the presiding officer should read a bill at length when affixing his signature, it went on to say: "If in either House any member shall object that any substitution, omission, or insertion has occurred, so that the bill proposed to be signed is not the same in substance and form as when considered and passed by the House, or that any particular clause of this article of the Constitution has been violated in its passage, such objection shall be passed upon by the House, and if sustained, the presiding officer shall withhold his signature; but if such objection shall not be sustained, then any five members may embody the same, over their signatures, in a written protest, under oath, against the signing of the bill. Said protest, when offered in the House, shall be noted upon the Journal, and the original shall be annexed to the bill, to be considered by the Governor in connection therewith."

One of the reforms that Charles McCarthy, as Chief of the Wisconsin Legislative Reference Department, helped to make in the procedure of the Wisconsin Legislature, was the printing of engrossed bills and the placing of them on the desk of each member. Thus, as he tells it, if a legislator found errors in his bill he could immediately stop its passage to the Governor and have them corrected. "This reform removed one temptation to corruption. The Governor at the same time secured an able attorney to examine bills before he signed them, so that if errors were found, they could be corrected before his signature was affixed. What he actually signed was one of the printed copies of the engrossed bills which were laid upon the desk of every member. Here were checks against mistakes in the passage and the final product, together with such watchfulness as would prevent dishonest clerks from inserting or removing something at the behest of interested parties." [1]

[1] *The Wisconsin Idea*, 194 *et sqq.* (1912).

Maryland in 1913 adopted a constitutional amendment allowing bills to be printed instead of engrossed.

Two thirds of the Constitutions go into detail as to signing by presiding officers, evidently with the hope thereby of getting some assurance of accuracy. That would appear from the arguments leading the Pennsylvania Convention of 1873 to put into the Constitution a provision that the presiding officer of each branch should sign all bills and resolutions in the presence of the House, immediately after the reading of their titles. What on the face of it would seem an unimportant matter was shown to be the contrary by Delegate Harry White, who said that from time to time members had protested that some bill the Governor had signed had never passed the Legislature, with the frequent result of the appointment of a committee of investigation and the delay of legislation. He believed the act preventing railroads from crossing at grade had never passed the Legislature. Delegate MacConnell specified another instance of the same sort.[1]

The period after the Revolutionary War furnishes an interesting illustration of the trouble that may come from the failure of formalities. There was much reluctance to carry out the stipulations of the treaty of peace in regard to the recovery of debts due to British subjects from American citizens. Settlement of the vexatious question was prevented in Virginia by an odd mischance. At the instance of James Madison and others the Assembly came to an agreement on resolutions that the impediments to recovery ought to be removed, but delays had spun out the transaction to the day before that fixed for a final adjournment. Several members of the House of Delegates went over to Manchester, across the river, with the intention of returning the next morning. The severity of the night made their return impracticable, the next day was as bad, and on the third, the absentees still refusing to take the risk, the impatient Assembly adjourned. Madison described the parliamentary situation in a letter to Jefferson: "The question to be decided is, whether a bill which had passed the House of Delegates and been assented to by the Senate, but not sent down to the House, nor enrolled, nor examined, nor signed by the two Speakers, and consequently not of record, is or is not a law." Rives says: "The *lex parliamentaria* was as inexorable as the unbridged torrent; and thus was unfortunately still left open a question which continued for years to be a source

[1] *Debates*, II, 630.

of bitter waters both in the foreign and domestic politics of America." [1]

The share of President or Governor in authenticating laws is, of course, an inheritance from the days when the King made the laws in response to the petitions of Parliament. Sir Thomas Smith, who wrote in Elizabeth's time, describes the scene on the last day of the sitting, when the Prince came in person "to declare his pleasure concerning their proceedings, whereby the same may have perfect life and accomplishment by his princely authority, and so have the whole consent of the realm." The titles of all the acts were read and the Prince declared as to each what he allowed or denied. In South Carolina, in colonial days, the old English precedent was followed. At the close of the session the Governor, Council, and Assembly came together, and the Speaker read the titles of the bills that had been passed. Thereupon the Governor approved or disapproved each, as he saw fit, his veto being final. So it came about that all laws were dated as of the last day of the session.

When the provinces became States, they did not at once dispense with all the old formalities. Edward Hooker, who was in Columbia, South Carolina, in 1805, witnessed the ceremony of ratifying Acts. "The House of Representatives, preceded by their Speaker," he wrote, "walk into the Senate Chamber. Then, in presence of both houses, the Secretary of State, assisted by the Clerk of each House, affixes the great seal of the State to those bills which have passed through the requisite stages in regular course. The Speaker of each House next subscribes his name. This being done and the records of the proceedings being read by the clerk of the Senate, the House of Representatives retires in the same order." [2] By her constitution of 1776 Maryland directed that the Governor should sign each bill, and thereto affix the Great Seal, in the presence of the members of both Houses. This remained the law until 1851, when it was changed to require the signing in the presence of the presiding officers and Chief Clerks of the Senate and House of Delegates.

Few traces of the ancient etiquette survive. Ours is an age of business methods, practical, time-saving. We have not, however, passed beyond the need of orderly processes, to secure accuracy and prevent fraud. The need of them is suggested by

[1] W. C. Rives, *Life and Times of James Madison*, I, 595 *et seqq.*
[2] Am. Hist. Assn., *Annual Report for 1896*, I, 879.

such a constitutional requirement as that of Missouri, under which after a bill has been signed by the presiding officers it must be presented to the Governor on the same day on which it is signed, by the Clerk of the House in which it originated. Kentucky, Louisiana, and Kansas also have provisions of like purport, evidently meant to lessen the chance for foul play in transmission. That seems a trivial matter to deal with in Constitutions, but it would be possible to cite instances of serious trouble that have made such precautions reasonable.

With the more general use of the printing-press in the processes of lawmaking, need for such provisions lessens. The Legislatures have been reluctant to abandon old customs calling for pen and ink, and not wholly without reason, for the permanence of the record had to be considered. With the improvement of the typewriter and the perfecting of the printer's art, there is no longer reason for continuing the labors of the engrossing clerk. In 1895 Kansas enacted that bills and resolutions might be enrolled by printing on parchment. In the same year California enacted that printed bills and documents should be considered engrossed if not further amended. Other States are traveling toward the same results in one way or another. The sooner all have brought their processes to accord with modern methods, the sooner will they avoid various dangers and evils now found in lawmaking.

Records

It is probable that every colonial assembly kept a record of its proceedings, but that each should have a Clerk of its own was not established from the start. Doubtless the course of development in other colonies was much like that in Massachusetts. There the Secretary of the Company at first kept all the records. It was some years after the lower House came to have a separate existence clearly recognized, when, in 1648, provision was made for a Clerk and for the accurate keeping of the Journals. The salary was to be ten pounds a year. Speaking of the choice of Samuel Adams as Clerk, in 1766, Hutchinson says, "the office having some emolument, it had generally been filled by one of the members, who took the same share in debating and voting as if he had not been Clerk, and rather acquired than lost influence by being so." [1] In New Hampshire a member served as

[1] *Hist. of Mass. Bay*, III, 148.

Clerk until 1721 and was paid by fees. Then it was decided to be better to have an outsider, with a salary, and nearly thirty years passed before the practice of having a member serve was resumed.

By the time the Constitutions were framed, it must have become in effect customary law that a record should be kept, and it is not clear that constitutional provision for Clerks was thought necessary. Yet the first Constitution, that of New Hampshire, though very brief, found room to direct "that a Secretary be appointed by both branches." South Carolina was silent on the subject. In Virginia and Maryland we may infer, from the use of the word "entered" in connection with electing the Governor, that the keeping of a Journal was taken as a matter of course. New Jersey was silent. Delaware referred incidentally to "the Journals and minutes of each House." Pennsylvania was the first to particularize, saying: "The votes and proceedings of the General Assembly shall be printed weekly during their session." Vermont copied this. North Carolina and Georgia said nothing about Journals for the legislative branches. New York said they should be kept "as heretofore accustomed," and should be published from day to day if the business of the Legislature would permit, except such parts as the Houses might determine not to make public. Massachusetts did no more than refer to "their records," in connection with the receipt of veto messages by the Houses. Then New Hampshire said (1784): "The Journals of the proceedings of both Houses of the General Court, shall be printed and published, immediately after every adjournment, or prorogation." Next Vermont decided (1786) that the votes and proceedings should be printed at the close of the session, "when one third of the members think it necessary."

The Articles of Confederation (1777) said the Congress of the United States should publish the Journal of their proceedings monthly, except such parts relating to treaties, alliances, or military operations as in their judgment required secrecy.

Pinckney's draft, the basis of the work of the Federal Convention, read: "Both Houses shall keep Journals of their proceedings, and publish them, except on secret occasions." The Committee on Detail changed this so that the Senate should keep a Journal only when "acting in a legislative capacity," omitted the reference to secrecy, and said the publication should be "from time to time." Elbridge Gerry did not like the "legis-

lative capacity" provision, preferring that each House might exercise its judgment in the matter of secrecy. The next day, with Sherman's backing, he moved to insert, after "publish them," the words, "except such as relate to treaties and military operations," but he was voted down, eight States to two. Ellsworth thought the clause objectionable in so many shapes that it would better be struck out altogether. "The Legislature will not fail to publish their proceedings from time to time. The people will call for it if it should be improperly omitted." Wilson was stoutly against striking out and he prevailed.

When the proposed Constitution was submitted to the States, one of the apprehensions was on this score, and the Virginia Convention proposed an amendment to require the publication of proceedings of Senate and House "at least once a year." It was an idle fear. The new Congress at once provided for publication of the Journal. The Senate resolution was that one hundred and twenty copies should be printed once a month for distribution among the members, and since each member was to get but one on his own account, presumably it was intended that they should give out the others to the public. In the earlier history of the House the Journal was published at frequent intervals and placed on the seats of the members. The custom of furnishing it in sheets was discontinued in 1872 and now the Journal is published at the end of each session. The daily publication of the "Congressional Record" is presumed to meet the passing need.

The example set by the Federal Constitution was followed by State after State until now all the Constitutions specifically direct the keeping of Journals, except that in New Hampshire and Vermont the result comes indirectly by provision for printing after the session, and in Massachusetts there has been no change from the original incidental reference to minutes and Journals. About three quarters of the States order publication, but only Kentucky directs that it shall be daily. In more than half the States, however, daily publication is the practice, as it ought to be in all. Eight or nine Constitutions direct publication after adjournment, but that ought not to preclude daily publication too. Vermont still requires a vote of a third of the members for publication; Connecticut, of one fifth. A resolution adopted by the Nebraska Legislature in 1913 (House Journal, 1348) complained that "Nebraska still maintains the old custom of keep-

ing a manuscript Journal, whose reading is uniformly dispensed with and whose contents are unknown until printed months after adjournment."

Daily printing ensures accuracy. Also it conduces greatly to the convenience of both the members and the public. One accustomed to procedure where the daily Journal is always at hand under the member's desk finds it hard to understand how any legislative body can forego its usefulness, and marvels that without it satisfactory work is ever done.

Printing makes superfluous the daily reading of the Journal at the opening of the session. Why that waste of time has not long ago been everywhere dispensed with, is one of the mysteries to grieve the practical man. Even the perfunctory reading of a few sentences here and there is so much loss. Hinds has pages of precedents relating to controversies the practice has caused in Congress. In the course of years of experience in the Massachusetts Legislature, so far as I can recall there was no instance where harm came from leaving correction of the Journal to the eyesight of members. The House rule requires that the Speaker shall examine the Journal daily, but if he does it, I suspect the perusal is most perfunctory. The Senate does not even bother to make such a requirement of its presiding officer. Errors in the Journal of either branch are of the rarest.

The provision of the Federal Constitution excepting from publication such parts of the Journal as may be adjudged to require secrecy, a provision kept there by a vote of six States to four, was in accord with the prevailing idea that matters of diplomacy, treaties, and the like ought not to be exposed to the vulgar gaze. It is an idea now much questioned and the happenings leading up to the World War make it doubtful if secret diplomacy in any form will hereafter be acceptable. More is to be said for absence of publicity in the matter of handling appointments to office, and those legislative bodies entrusted with that duty perhaps find useful protection in constitutional provisions. Nearly a score of States permit publication to be dispensed with when it is thought there is occasion for secrecy. Unless it be in Senates that confirm appointments, no legitimate occasion for secrecy ever arises in a State Legislature. Provisions permitting it are unwise and probably would not nowadays be accepted.

Time was, however, when the right of secrecy was a prerogative precious to lawmaking assemblies, and in defense of it they

would go to great lengths. Only the importance of the right can condone the horrid happening that befell the Clerk of the Virginia House of Burgesses when in 1624 the King's Commissioners to inquire into the affairs of the colony asked for the public records "The Assembly refused to show them, albeit they were ready to answer questions propounded in a becoming temper. But the commissioners practised upon Sharpless (the Clerk of the House) and induced him to furnish them with a copy of the records, whereupon the Assembly condemned the said Sharpless to stand in the pillory and have half of one ear cut off." [1]

Another Virginia Clerk, Robert Beverley by name, got into trouble threescore years later. Because James II thought Beverley had chiefly occasioned and promoted the disputes and contests in the session of 1685, the King declared the miscreant "uncapable of any office or public employment within our colony of Virginia, and that he be prosecuted according to the utmost severity of the law for altering the records of the Assembly if you [the Governor] shall see cause." [2]

Expunction and Correction

Bitter controversy of far-reaching political significance has at times sprung from the question of what a Journal should contain, the question coming on the expunction of some entry. The most notable instance in Parliament has been that due to the resolution of the House of Commons, February 17, 1769, "that John Wilkes, Esq., having been, in this session of Parliament, expelled the House, was and is incapable of being elected a member to serve in the present Parliament." Forthwith it was moved that this be expunged from the Journals, "as being subversive of the rights of the whole body of electors of this Kingdom." A resolution to that effect was introduced every year until 1782, and then passed by a vote of nearly three to one. The procedure was dramatic. The Clerk at the table, in the presence of the whole House, which remained silent with all business suspended during the process, blotted out the obnoxious resolution letter by letter.

A noteworthy instance of expunction appears in the Virginia House of Burgesses of the troublous times before the Revolution. In 1765 Patrick Henry moved a set of resolutions declaratory of the rights of the colonists, and his eloquence succeeded in car-

[1] John Fiske, *Old Virginia and Her Neighbours*, I, 232.
[2] Hening, *Statutes at Large*, III, 41.

rying the question by one or two votes. The next day, however, calmer judgment prevailing, it was voted to strike one of the resolutions from the Journal.

The question first vexed Congress in 1806, when John Quincy Adams presented in the Senate memorials for Samuel S. Ogden and William S. Smith, praying for relief because of their treatment by the Judge of the District Court of New York. Leave to withdraw was voted after a rancorous debate, and then Senator Wright moved to expunge everything relating to the matter. The motion prevailing, Wright wanted even the record of it not to appear. Adams tells the story in his "Diary" (1, 437 *et sqq.*). "Many of the other expungers," he says, "were equally strenuous for this total suppression. And Smith of Maryland, the President *pro tem.*, in the most peremptory manner decided that the expunging vote should not appear. I then very shortly pointed out the danger of such a precedent, if a majority at any time could deface the records of the body. Mr. Pickering read the article of the Constitution requiring that Journals should be kept and that the Yeas and Nays, when required by one fifth, should be entered on the Journals. Mr. Tracy read a rule of the Senate that every *vote* of the Senate should be entered in the Journals. Wright still insisted that the expunging vote should not appear. The article of the Constitution, he said, referred only to the legislative proceedings of the Senate. Smith, however, the President *pro tem.*, could not hold out with Wright. He first staggered, said he was in doubt, and wished the sense of the Senate on the subject; and finally came round completely, and declared that it could not be helped — the vote must stand. Wright still insisted. Smith again declared it must be so — the vote must appear upon the Journals; and it would be very proper that it should appear. Upon which Wright declared himself perfectly satisfied."

A score of years later the Senate was to be the scene of the most notable of the contests over the matter. It rose over the record of a censure passed on President Jackson by the Senate March 28, 1834, after an almost continuous debate of three months. As adopted the resolution read: "Resolved, That the President, in the late executive proceedings, in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both." With the subject-matter of the controversy it is not nec-

essary here to concern ourselves beyond explaining that the offense of the President, in the eyes of a majority of the Senate, was his dismissal of the Secretary of the Treasury because he would not remove the public funds from the bank of the United States, and the appointment of a successor to effect such removal. The censure angered Jackson to the point of sending to the Senate, April 17, a long formal "protest," which he demanded should be entered on its Journal. Another month was consumed in debating whether or not to comply with his demand, the result being resolutions, of which the last two contain the substance:

"Resolved, That the aforesaid protest is a breach of the privileges of the Senate, and that it be not entered on the Journal.

"Resolved, That the President of the United States has no right to send a protest to the Senate against any of its proceedings."

Benton, Jackson's warmest champion in the Senate, at once began a campaign to secure the expunging of the resolution of censure, and pursued it indefatigably until he triumphed, January 16, 1837. The story of the acrimonious contest may be read in any of the histories of the period, or the biographies of the statesmen who took part — Webster, Clay, Calhoun, Benton, and the rest. As far as the legislative phase goes, the argument against expunging may be summed up with the declaration of Calhoun, the best logician of them all: "No one, not blinded by party zeal, can possibly be insensible that the measure proposed is a violation of the Constitution. The Constitution requires the Senate to keep a Journal; this resolution goes to expunge the Journal. If you may expunge a part, you may expunge the whole; and if it is expunged, how is it kept? The Constitution says it shall be kept; this resolution says it shall be destroyed. It does the very thing which the Constitution says shall not be done. That is the argument, the whole argument. There is none other."

The force of the argument is palpable. Unbiased by prejudice, outside the sway of partisan emotion, any man would at first say that a Journal is not to concern itself with the circumstances, but is to be simply a truthful record of happenings. A record is a record, whether made by a pen or a sensitized plate or a wax cylinder. Benton, therefore, had the task of showing why a record should not be a record. Whether one accepts his logic or not,

it has technical interest. The foundation of his argument was that matter had been put on the Journal which should not have gone there. He denied the authority of the Senate to pass the resolution of censure; and he affirmed that it was unjust, and contrary to the truth, as well as contrary to law. He denied that to expunge meant to destroy and to prevent the expunged part from being known in the future. The matter expunged is incorporated in the expunging resolution, and lives as long as that lives. The only effect of the expurgation is to express, in the most emphatic manner, that such matter ought never to have been put in the Journal.

The victorious Benton afterward described what took place when he had triumphed over his enemies: "The Secretary thereupon produced the original manuscript Journal of the Senate, and opening at the page which contained the condemnatory sentence of March 28, 1834, proceeded in open Senate to draw a square of broad black lines around the sentence, and to write across its face in strong letters these words: 'Expunged by order of the Senate, this 16th day of March, 1837.' Up to this moment the crowd in the great circular gallery, looking down upon the Senate, though sullen and menacing in their looks, had made no manifestation of feeling. When the Secretary began to perform the expunging process, instantly a storm of hisses, groans, and vociferations arose. The presiding officer promptly gave the order to clear the gallery. Mr. Benton opposed the order, saying: 'I hope the galleries will not be cleared, as many innocent persons will be excluded, who have been guilty of no violation of order. Let the ruffians who have made the disturbance alone be punished; let them be apprehended.' The ringleader was seized and brought to the bar. This sudden example intimidated the rest; and the expunging process was performed in quiet. The gratification of General Jackson was extreme. That expurgation! it was the 'crowning mercy' of his civil, as New Orleans had been of his military life!" [1]

Henry Clay, however, felt no gratification. The next day he wrote to one of his friends: "I shall hail with the greatest pleasure the occurrence of circumstances which will admit of my resignation without dishonor to myself. The Senate is no longer a place for a decent man. Yesterday Benton's expunging resolution passed, 24 to 19." And to another: "I shall escape from it

[1] *Thirty Years' View*, 1. 730.

[the Senate] as soon as I decently can, with the same pleasure that one would fly from a charnel-house." [1]

Had the motion to expunge come up in the lower branch, it could not have prevailed if precedent were to be followed, for in 1810 Speaker Varnum had held that unanimous consent was necessary to expunge a vote from the Journal. The same ground was taken by the presiding officer of the Pennsylvania House of Representatives of 1832–33. Since then rulings by Speakers of the National House seem to have established that correct record of what took place may not be expunged, save of course by unanimous consent, which permits anything. In point of fact many things have been omitted from the Record and Journal by unanimous consent.

The record of a resolution offered in the Massachusetts House March 4, 1918, was ordered to be expunged. It criticized the United States Senators from Massachusetts for their course in relation to the conduct of the war, and in its place was substituted a vote of commendation for that course, by 194 to 3. On the motion to expunge there was no division, and the propriety of expunging was not questioned. At the close of the session of 1919 censure of a member made earlier in the session was expunged.

The correction of Journals is, of course, quite another matter. Besides unintended errors, there have been those of sinister purport to guard against ever since there were such things as records. When Julius Cæsar as Consul had directed that the proceedings of the Roman Senate should be published, together with the acts of the popular assemblies and the principal events of the day, in his *acta diurna* or Journal of the city, he himself, and after him the Antonines, scandalously falsified the reports, and even affixed to their decrees the names of absent Senators, to give them more weight. The practice has not died out. In State Legislatures where the custom of short or omnibus roll-calls prevails, it is common for recording clerks to enter the names of members as voting for measures, unless expressly notified to the contrary. Such a practice seems incredible to one personally familiar with only the Massachusetts Legislature, where no clerk would ever dream of daring such a thing. No language in reprehending it would be too strong.

That the Journal shall be accurate in this particular becomes

[1] Schurz, *Henry Clay*, II, 106.

a matter of grave importance when the validity of legislation is questioned in the courts of those States that require the Yeas and Nays to be entered on the Journal in the case of the final passage of every bill. Such a provision is in part designed to furnish definite and conclusive evidence whether or not the bill has been passed by the requisite majority. It was held in Spangler *v.* Jacoby, 14 Ill. 297 (1853), that the office of the Journal is to record the proceedings of the House and authenticate and preserve the same. "It must appear on the face of the Journal that the bill passed by a constitutional majority. These directions are clearly imperative. They are expressly enjoined by the fundamental law and cannot be dispensed with by the Legislature."

It is the final record that constitutes the Journal. In 1917 the Secretary of the Arkansas Senate failed to incorporate in his Journal the record of the Yea and Nay vote on the passage of a certain bill. By testimony it was shown that the minutes of the Journal Clerk contained the list, but the court thought this could not suffice and so held the bill not properly passed and therefore invalid. The court declared that the framers of the Constitution meant by the term "Journal" a permanent record. The daily minutes are merely temporary and do not constitute a part of the permanent record. [1]

The courts have consistently given to the Journals authority controlling as to prior happenings. In State *v.* Mead, 71 Mo. 266 (1879), it was held that in the absence of protest "noted upon the Journal" the presumption was in favor of right and not wrong. The same ground was taken in State *v.* Field, 119 Mo. 593 (1893), and in McCaffery *v.* Mason, 155 Mo. 486 (1899). In Attorney-General *v.* Rice, 64 Mich. 385 (1887), parol proof that a skeleton bill had been used to evade the Constitution was declared unavailing because — "The testimony of an individual could not be received to contradict a statute, and, if not, why receive it to contradict an entry upon the Journal?" The Michigan court went on to refuse even recognition to an admission on the pleadings that no bill was ever introduced, but that the title was endorsed upon a blank piece of paper and put in. "Courts do not allow parties to stipulate or agree, or admit by pleadings, that a statute was not properly or constitutionally passed by the Legislature. If the Constitution has not been complied with in the passage of an act, that fact must be shown by the printed

[1] Niven *v.* Road Imp. Dist. No. 14, 132 Ark. 240 (1918).

Journals, or the certificate of the Secretary of State, the custodian of legislative proceedings. Such facts cannot rest in parol."

This, it will be seen, left uncertain the further question of whether the Journals or the certificate of the Secretary of State shall prevail in case of discrepancy. In State *ex rel.* Attorney-General *v.* Green, 36 Fla. 154 (1895), Chief Justice Mabry set forth the situation. "There are," he said, "two conflicting views held by the decisions on the subject. Under constitutional requirements that Journals of the proceedings of the legislative bodies shall be kept and published, it has been held in many decisions that where the Journal entries, as to the legislative proceedings, are explicit, and conflict with legislative acts regularly authenticated, the Journals are superior, and the courts will be governed by them as to matters clearly, explicitly, and affirmatively stated therein. The other view, maintained by high authority, is that the legislative act itself embodied in a bill engrossed and enrolled, and bearing the proper official signatures, is of higher dignity than the Journals, and will override them. This court has placed itself on the side of those maintaining the view first stated."

As typical of the doctrine that certification is the test may be cited Kilgore *v.* Magee, 85 Pa. 401 (1877), in which the court said: "In regard to the passage of the law and the alleged disregard of the forms of legislation required by the Constitution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the consciences of the members of the Legislature are involved, the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage."

When Congress enacted the tariff law of 1890, it developed that a section of the bill as it finally passed was not in the bill authenticated by the signatures of the presiding officers of the respective Houses and approved by the President. For this reason the plaintiff in Field *v.* Clark, 143 U.S. 649, a most important suit, averred the whole law was to be deemed an absolute nullity. The contention was that it could not be regarded as law if the Journal of either House failed to show that it passed in the

precise form in which it was signed by the presiding officers and approved by the President. The court, however, by Justice Harlan, held it was not competent to show from the Journals that the act did not pass in the precise form in which it was signed. The authentication is complete and unimpeachable. A large number of like decisions by State courts were cited. In Harwood *v.* Wentworth, 162 U.S. 547 (1896), Harlan, J., this was considered, affirmed, and applied as decisive of the case.

On the other hand, the New Hampshire Supreme Court in 1858 gave an opinion (35 N.H. 379) to the effect that an act was not a law, though signed by Speaker and President, and approved by the Governor, because it did not appear that an amendment made by the Senate had been concurred in by the House.

CHAPTER XXIV

THE WORDING OF LAWS

From time immemorial there has been ground for the constant complaint of the wording of laws. Let no man suppose the fault-finding is anything new. Examine the dealings between the American colonies and the mother country, and you will find that your forefathers were as much criticized as you are. The very first laws enacted by a lawmaking body in America, those of the Virginia Assembly of 1619, sent to England for approval as was to be the common course with colonial legislation, were there regarded as "judiciously carried, but exceeding intricate." [1]

Trouble continued. In some cases acts were so carelessly framed that they were in parts inconsistent or unintelligible. The King's counsel reported, for example, that a Massachusetts law making lands and tenements liable for the payment of debts, was so unhappily worded that he could not see how, "by any construction whatever, it could effect the end proposed by it." [2] The Board complained that definitions of crime were too general, and found fault with such phrases as "Devilish Practice," or "playing at cards, dice, lotteries or such like." A New Jersey act imposed capital punishment upon counterfeiters of foreign coin that was "by common consent" passed as full satisfaction of debts. Criminal statutes often contained no clauses making premeditation or intent essential to conviction, and it was pointed out that they afforded judges an undue discretion, liable to arbitrary extension and abuse.

Bad lawmaking was even thought by the authors of "The Federalist" to be one of the reasons justifying the forming of the Nation. "It may be affirmed, on the best grounds," said Hamilton or Madison in No. 62, "that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which

[1] J. E. Cooke, *Virginia*, 117.

[2] E. B. Russell, *The Review of the Am. Colonial Legislation by the King in Council*, Col. Univ. Studies, LXIV, 143, 144.

fill and disgrace our numerous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people, of the value of those aids which may be expected from a well-constituted Senate?"

Do not suppose either that the complaints have been confined to the lawmaking of our own country, or that the occasion for them has anything peculiar to our situation or institutions. The most vigorous criticism we can show may be matched by opinions of English writers concerning the work of Parliament itself. For example, read what Townsend, in his "History of the House of Commons" (p. 380 *et sqq.*), quotes from an amusing pamphlet entitled "The Division of Labour," which must have been printed in 1828 or soon after. The author said of Parliament: "The products of its deliberative wisdom, of its legislative skill, are turned out in a very unworkmanlike and defective manner. Acts are designated as futile, trumpery, unintelligible, so abounding in errors of grammar even, that the very printer puts *sic* in the margin. The highest legal authorities speak of them as acts ill-penned, inadequate to their purpose, so loosely worded that no proceedings could be instituted under them — passed in ignorance of the practice they tried to improve. Any attempt of the unlearned public to understand the statutes is like an endeavour to interpret a Runic inscription. We have pitiful legislation about muffin plates, twigs for hoops, newsmen's horns. There are faggot acts, binding together matters between which there exists not one particle of affinity or relation. This *pot-pourri* mode of legislating is not the exclusive characteristic of past times. Many acts are even now passed in one session only to be repealed in the next. To alter, to amend, and to explain, appear to be the terms in which our legislators most delight."

A curious collection could be made of the blind, misleading, inconsistent, or ridiculous provisions that have been put into the statutes even in our day, when intelligence and learning are supposed to be so much more common than ever before. Let it suffice here, by way of illustration, to repeat some of the things told to the Governor's Conference of 1913 by Governor Hodges, of Kansas, about lawmaking in his State. He cited the law governing the inspection of hotels and lodging-houses with this mandate: "All carpets and equipment used in offices and sleeping-rooms, including walls and ceilings, must be well plastered." For

six years there stood on the statute books, as part of the law regulating automobile traffic, a provision beginning: "Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing, or in any other manner or form, infringing upon the prerogative of any political chauffeur, to run an automobilious bandwagon at any rate he sees fit, compatible with the safety of the occupants thereof." The jest went on with six or eight more lines of nonsense. "Notwithstanding the fact that my executive clerk and the Attorney-General did their best to scrutinize all the bills, chapters 177 and 178, and chapters 174 and 175, respectively, are duplicates. Chapter 75 of the Laws of 1911 was repealed three times. . . . Chapter 318 of the Laws of 1913 was immediately amended by Chapter 319 of the Laws of 1913. Chapter 82 of the Laws of 1911 was repealed by section 7 of chapter 89 of the Laws of 1913, and after being repealed was then amended and repealed by chapter 108 of the Laws of 1913."

For proof of the failure to express the legislative will accurately and adequately, examine almost any volume of law reports, more fruitfully one of cases adjudicated in the newer States. For instance, volume 90 of the Pacific Reporter, containing about one thousand opinions of Supreme and Appellate courts in cases decided in thirteen Western States within two months of 1907, shows 416 cases in which the construction of statutes or Constitutions was involved.[1]

Criticism does not spare lawmaking bodies expected to have higher standards of workmanship than those of some of the younger Legislatures. Thus F. J. Stimson, thorough student of statute law, castigates even the product of Congress. He cites, as "perhaps the most horrible example of slovenliness, bad form, and contradiction of all" the Statutes of the United States, that which he calls the most important, the amended Interstate Commerce Act, known as "the Hepburn Act." This wonderful product of compromise, he points out, begins with an amendment to itself. It does not tell you how much of the prior law was repealed, except upon a careful scrutiny which only paid lawyers are willing to give. To the old Interstate Commerce Act of 1887, quoted substantially in full, it adds a mass of other provisions, some of which are *in pari materia*, some not; some contradictory

[1] Ernest Bruncken, "Defective Methods of Legislation," *Am. Pol. Science Review*, May, 1909.

and some mere repetitions. It amends acts by later acts and, before they have gone into effect, wipes them out by substitutions. It hitches on extraneous matters and it amends past legislation by mere inference. Like a hornet it stings in the end, where revolutionary changes are introduced by altering or adding a word or two in sections a page long, and it ends with the cheerful but too usual statement that "all laws or parts of laws in conflict with provisions of this act are hereby repealed." As a result no one can honestly say he is sure he understands it, any more than any serious lawyer can be certain that its important provisions are any one of them constitutional. And that huge statute with sections numbered 1, 2, 5, 16, 16*a*, etc., with amendments added and substituted, amended and unamended, is contained in twenty-seven closely printed pages. "I venture to assert boldly that any competent lawyer who is also a good parliamentary draftsman could put those twenty-seven pages of obscurity into four pages, at most, of lucidity, with two days' honest work. By how little wisdom the world is governed! And how little the representatives of the people care for the litigation or trouble or expense that their own slovenliness causes the people! For the necessity of political compromise is no excuse for this." [1] As an instance of what can be accomplished by skill in condensation, Mr. Stimson tells of a Massachusetts chapter to protect the public against personal injuries caused by insolvent railway and street-railway companies. He says this was drawn up by a good lawyer, and contained between twenty and thirty sections, or about three pages of print. It was brought to another lawyer, certainly no better lawyer, but a legislative expert, who got all that was desired into one section of five lines.[2]

Sometimes inadequate statutes are deliberately perpetrated. A famous instance of this is the Sherman Anti-Trust Law. Senator Hoar, who was largely responsible for that far-reaching measure, in telling the story of it in his "Autobiography" (II, 364), admits that it was expected the general phrase, "agreements in restraint of trade," which in the event made so much trouble, would be construed by the court, resulting in the growth of a body of decisions that would enable Congress to make such amendments as might be found by experience necessary.

It may be a question whether such intentional and avowed refusal to anticipate difficulties is more or less excusable than pro-

[1] *Popular Lawmaking*, 361, 362. [2] *Ibid.*, 357.

vision ignorantly or carelessly made without prevision. Of course it is the duty of the lawmaker to look as far into the future as he can, and he has no right to neglect the possibility that what he formulates will create conditions, perhaps develop a body of evils, which it will be hard to reform; but much may be pardoned by reason of the difficulty of foresight. Probably it would be uncharitable to blame the man who put into the Massachusetts Charter of 1691 a single word that has caused most serious trouble, has vexed courts and lawmakers now for many years, and has in some measure affected the fortunes of countless men. It may have been simply as a rhetorical flourish that some verbose clerk put the word "proportionable" into the description of the power given to the General Court — "to impose and leavy proportionable and reasonable Assessments Rates and Taxes upon the Estates and Persons," etc. Changed to "proportional" when John Adams copied the clause into the Constitution of 1780, that word has now for half a century stood in the way of adequately revising the taxation system to meet modern conditions brought about by the development of corporations and the enormous growth of intangible property.

Samuel J. Tilden brought to the notice of the New York Constitutional Convention of 1867 a striking instance of how thoughtlessness, stupidity, or blunder may be perpetuated and its influence may spread. Said he: "It happened to me in the Convention of 1846 that an article on corporations had been balloted to and fro without coming to a result satisfactory to anybody; and it was sent to a select committee of which I was chairman. That committee decided on the adoption of one provision that I was unable at that time to understand. I reported it as they ordered, and it became a part of the fundamental law. A short time after that I was passing through Albany, and I heard a very curious discussion in the Senate as to the meaning of that provision. On my returning to New York I met the author of it, and found him as much puzzled as the Senate had been or as I had been. But, sir, that article, clause for clause, word for word, letter for letter stands in the Constitutions of seven different States of the Union."

There are scores of reasons why laws are badly drawn. These may concern the content, the technique, or the conditions of enactment.

In matter of content the defect may frequently be traced to

the want of basic principle. For example, a law regulating divorce may fail because written without regard to the fundamental cause for protecting the marriage contract. Lacking a common foundation of principle, laws that should be related prove inharmonious. Striking illustration of this appears in the criminal code. Penologists, moralists, philanthropists, physicians, philosophers differ widely about the purpose behind the treatment of crime and criminals. Some emphasize punishment, retribution, vengeance; others approach from the direction of abnormality, cure, reform. No agreement as to what justice may be furnishes a common starting-point. Of course there follow wide variations of penalties, often inconsistent, usually unsympathetic. The attempt to make the punishment fit the crime, though less scandalous than it was one or two centuries ago, remains abortive.

Penalties also bring trouble from the side of enforcement. A conspicuous example of neglect to take this into account may be found in the American laws relating to corrupt practices in elections. Almost completely do they fail to provide a sufficient motive for enforcement. No individual, no party, gains by exposing the culprit. The result is a mass of regulations and prohibitions that fall far short of their purpose and chiefly end in burdening the conscientious candidate while causing little inconvenience and no serious damage to the rascal.

Discord is often due to sheer ignorance. Few men master the whole huge bulk of statutory law or keep closely enough in touch with changes to let them be sure that the new enactment with which they are concerned does not conflict with something already in force that ought not to be touched and that there was no intention to touch.

Ignorance of the future is every man's lot. The inability to foresee changing conditions may speedily make ridiculous a law that seemed reasonable enough when enacted. This has brought scorn to measures springing from coal famines, food shortages, epidemics. The slower changes wrought by time in customs and habits presently expose to odium much of sumptuary legislation. More blameworthy are laws that have effects unexpected because reasonable probabilities have not been studied. Every enactment disturbs status. What helps one man hurts another. In the eagerness for benefit, perhaps no thought is given to injury, and rank injustice that should have been palpable may follow.

This danger marks the distinction between common law and statute law. Courts adjudicate; legislatures anticipate. The court applies a specific rule to a concrete case; the legislative body, in enacting general laws, creates an abstract rule for cases yet to come. General legislation is *a priori*, and every logician knows what trouble that implies. Few things are harder than to anticipate wisely or completely. Could all the possible applications of any general rule of law be foreseen, courts and judges would have little to do.

Sometimes the failure of legislators to look ahead gives to the beneficiaries of special legislation opportunity never intended. Such was the case with what has been called the first "joker" in an American statute The chances are that in the course of well-nigh two centuries of lawmaking on this continent, shrewd men had occasionally accomplished the same sort of thing that Aaron Burr achieved when in 1799 he introduced in the Legislature of New York a bill for supplying the city of New York with water, but very likely nothing before approached this bill in result, for it authorized Burr's company to employ surplus capital "in the purchase of public or other stock or in any other monied transactions," by reason of which it is said a New York bank is still doing business.

For the most part, however, the problem of special legislation differs from that of general legislation. Special legislation is analogous to the equity jurisdiction of the courts, and results in bad laws because a numerous assembly is by its composition and conditions likely to be unfitted for dispensing mercy with justice. A special law is an exception to a general rule, and legislatures are much better qualified to make the rule than to make the exception.

Technique furnishes the most common occasion for criticism. Here the blame is often to be laid at the door of language. The inadequacy, the inaccuracy, the indefiniteness of words should palliate many an offense of the lawmakers. Remember that the courts have restated the fundamental principles of the common law thousands of times without finding phraseology adequate to every exigency. As for inaccuracy, bear in mind that words are but symbols. How can you know that they symbolize the very same thing to any two human beings? Ask yourself why you are sure that "yellow" conveys the same idea to your neighbor as to yourself. In a law library you may find thick volumes that contain

nothing but the judicial constructions that have been given to words and phrases. Few indeed are the men who master even the definitions that have chanced to puzzle the courts, to say nothing of the vast aggregate of symbols to be found in the latest dictionary.

With the combination of these symbols into sentences for the purpose of conveying thought begins the most difficult and delicate of arts. Here the best educated and most intelligent of men show an infinite diversity of practice. Is it, then, a matter of astonishment that men of but ordinary capacity and training, who prevail in legislative halls, should flounder and blunder? Rather is it not the remarkable thing that they so seldom make serious trouble by their inaccuracies in the use of an instrument that at best is sadly imperfect? Have mercy on them when you recall what has sprung from the uncertainties of the most momentous body of laws and precepts and doctrines the world has ever known, Holy Writ itself. Recall the persecutions, the martyrdoms, the wars, the endless strife of sects, the quarrels, the fanaticisms, the countless arguments, sermons, pamphlets, books, that have sprung from differences of opinion as to the meaning of the sentences of the Bible. Or turning to what we more commonly think of as law, find yourself confronted by the prospect of days on days of study if you would master all the controversy produced by a single enactment, the Statute of Frauds, although it was framed by one of the greatest lawyers that ever lived. And if you are still unmollified, take up all the decisions of the courts that have been required to interpret that great document, the Constitution of the United States, wonderful for simplicity, brevity, clarity, and yet perpetual source of uncertainty.

Note that our difficulties with the Constitution are not because of its brevity and simplicity, but in spite of them. Prolixity is the baneful characteristic of many laws, and the blame for this attaches to past generations. In the days when draftsmen and copyists were paid by the number of words, the legal profession developed a redundant phraseology that still obsesses and plagues. Along with it we Anglo-Saxons have inherited a tendency to elaborate our laws dangerously in matter of detail. In the attempt to anticipate all contingencies and with a reluctance to leave anything to administrative interpretation, we minutely specify to a stupid degree. For example, a teachers' retirement and pension system was created in Massachusetts a few years ago by a

law plentifully supplied with administrative provisions, according to custom. The law was very carefully drawn, probably as near perfection as lawmakers often reach. Yet the Board for its administration, of which I may speak from the personal knowledge given by membership, at nearly every meeting for many months found some detail where the law might have been happier. In private business it is held to be the wise course to employ a competent man, tell him what is to be done, and for the most part leave him alone to do it as he thinks best. It would often be far better in public business to lay down purposes and leave methods to administrative officials. Apparently the assumption now is that those who are to apply and enforce our laws are dolts or knaves, incapable of exercising sound discretion and likely to oppress.

Many embarrassments come from restrictions never contemplated that are imposed by phrases relatively unimportant. Our Constitutions, our statutes, our by-laws (both public and private, as of corporations, and all sorts of organizations), abound in trouble-making language, often thrown in because it sounds well, often copied without thought of difference in conditions, sure sooner or later to hamper and harass, without benefit. Also we becloud our mandates by an artificiality of language that confuses the ordinary citizen, unfamiliar with legal terminology. Plain, simple, concise statement is avoided. Long, involved sentences make a maze in which the inexpert get lost, and even the trained lawyer may find himself bewildered. Mr. Justice Stephen, speaking from his own experience, for he had many occasions to draft acts of Parliament, observed of such acts that, although they may be easy to understand, people continually try to misunderstand them. Therefore it is not enough to attain to a degree of precision that a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision that a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand.[1]

With such difficulties and dangers besetting the path of the lawmaker, it ought not to be matter of marvel that no better results in point of workmanship come from the labors of American legislative assemblies, made up as they are for the most part with few members having any technical training in this intricate art, yet with many members so supremely confident of their

[1] Lord Thring, *Practical Legislation*, 9.

capacities that but very slowly and reluctantly do they consent to make use of expert help.

Furthermore, account must be taken of the fact that expert help is not yet easily to be had, for we have only begun to develop a science of statute law. Much remains to be done before we can confidently count on an abundant supply of specialists in this field, competent to advise and guide.

Finally in way of excuse for bad laws it is fair to urge the hampering conditions under which all our laws are enacted. The overwhelming volume of business poured into our legislative halls compels haste that makes the best work impossible. Other occasion for disastrous hurry is to be found in the limitation of the length of sessions, by Constitution or custom, or as the inevitable corollary of under-payment of members. Then, too, the very nature of a numerous assembly made up of partisans compels sacrifices that are inconsistent with perfection. This appears in even so eminent a body as the House of Commons. Bryce tells us the facilities that Parliamentary procedure there affords for delaying the progress of bills are so ample, not to say profuse, that the practice has grown up of drafting bills, not in the form most scientifically appropriate, but in that form which makes it easiest for them to be carried through under the fire of debate.[1]

The same necessities appear in every American legislative assembly. He who has a keen sense of the proprieties must again and again stifle his conscience, yield non-essentials, consent to minor imperfections, for the sake of achieving the vital result. Compromise is of the essence of legislation and compromise is not scientific. Particularly damaging is the power of amendment. Its impulsive, heedless, or hostile use is so easy that many and many an admirable bill gets woefully marred in the course of passage. The authors fully realize the damage, but they are forced to concede something in order to get anything. Until in this respect parliamentary procedure is perfected, disfigured laws will abound.

It is with a legislative assembly as with a newspaper. Everybody not a newspaper man is astonished that the newspaper contains so many errors. Every newspaper man is astonished that it contains so few errors. Given boundless opportunity for error, some percentage of it is inevitable. So he who knows lawmaking

[1] *Studies in Jurisprudence*, 736.

bodies from the inside marvels at the comparative excellence of their product.

Laws about Lawmaking

Laws have not escaped laws. In the attempt to reach by statute everything that does harm, the lawmakers have undertaken to regulate lawmaking. This is no modern development. The ancient Romans may have begun it. The *Lex Licinia*, the *Lex Libutia*, the *Lex Cœcilia Didia* tried to ensure that the law should not unintentionally contain any particular personal privileges, or weaken the force of former law, or be crowded with multifarious matter. Therefore, if our own times have seen much effort in this field, it has at any rate been no more than an extension of theory familiar in an age when legislation was a science cultivated with care and refinement.[1]

Of course rules meant to secure orderly processes are normal and defensible. When going beyond this and aiming at the prevention of evils, they run the chance, common to all restrictive legislation, of doing more harm than good. Of this a conspicuous instance is to be found in the provisions about titles.

Originally titles of acts were of no consequence. They were not used at all for more than two hundred years after Parliament began making laws. The acts of each session were not set off with separate headings of description, but were strung together as chapters of one statute. Early in the reign of Henry VIII began the present practice of giving to each chapter a distinct title. In the eyes of the law this was not deemed a part of the chapter. Lord Holt said that the title was no more a part of the act than the title of a book is part of a book. So the courts relegated titles to the limbo of superfluity. They justified themselves on the ground that the title was framed by the Clerk at the outset, or by the judges after the receipt of the King's answer to the petition, and was meant only as a convenient mode of reference. In England it is still the case that the title may serve in judicial proceedings to throw light on the intent of the lawmakers if the body of the statute is not clear; but if there is no ambiguity in the body of the statute, the title cannot control

Such was the understanding in this country also until constitutional provisions about titles became common. These had their origin in the damage done by reliance on titles in the course

[1] James Kent, *Commentaries on American Law*, I, 238, note.

of legislative procedure. Sometimes the title deceived the legislators themselves, too busy to scan carefully a measure coming from a committee favored with over-much confidence. More often the harm came from deceit of the public, lulled by an apparently harmless title that in reality hid something obnoxious or iniquitous. It was an episode of this sort that caused Georgia to take the lead in constitutional precaution. At the time of the Yazoo frauds, the act under which millions of acres of State lands were sold for about a cent and a half an acre, was entitled "An Act for the Payment of the late State Troops," with a declaration of the right of the State to all its unappropriated territory "for the protection and support of its frontier settlements." In their righteous indignation over the shameless way in which they had been betrayed, the people of Georgia proceeded, in 1798, to put into their Constitution a stipulation that no law or ordinance should pass "containing any matter different from what is expressed in the title thereof."

No other State had so drastic a lesson as to the need of honest titles, and not for many years did the volume of petty chicanery get big enough to call for widespread attention. It must have become of consequence by 1844, for New Jersey, in the well-considered revision of her Constitution then made, recognized it when striking with one blow at log-rolling, riders, and deception, saying: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in its title." The advantage of this has so impressed itself on the States since then revising Constitutions or writing them anew that now only eight States, those of New England with North Carolina and Arkansas, remain without provision on the subject. Again one is impressed with the good fortune of New England in being able by the force of custom and self-respect to avoid occasion for constitutional prohibitions, and it is a pleasure to include North Carolina and Arkansas in the inference.

Not all the prohibiting States have gone so far as New Jersey. New York, in 1846, restricted the provision to private or local bills, and Wisconsin, in 1848, followed that example. Had the Constitution recommended by the New York Convention of 1867 been adopted, this provision would have been made general. The Commission of 1872 recommended such a change, but it did

not meet the approval of the Legislature. A dozen States make exception of appropriation or revenue bills; half a dozen, of bills for codifying the statutes. Mississippi contented itself (1890) with milder phraseology than any other State — "The title ought to indicate clearly the subject-matter, or matters, of the proposed legislation." This is not mandatory, hardly directory — a mere admonition, and so of slight consequence, for disregard of it would not invalidate an act. Mississippi, however, went beyond any other State with this pioneer provision: "Each committee to which a bill may be referred shall express in writing its judgment of the sufficiency of the title of the bill, and this, too, whether the recommendation be that the bill do pass, or do not pass." In fifteen of the States the measure is good *pro tanto* as to the subjects that are embraced in the title.

It is now generally held in the States with title requirements that the title is part of the act, limits its scope, and is properly used in interpreting its words whether or not they would otherwise seem to have no ambiguity. The result has not been satisfactory. Much litigation has been produced. For example, the annotated edition of the Louisiana Constitution printed in 1917 cited more than one hundred and eighty cases bearing on the provision that had been copied from New Jersey. Much litigation of course signifies that provisions have developed much uncertainty — always a bad feature of law. This in turn has led to the devising of broad, general titles, really giving little information as to the contents of the act, but likely to balk hair-splitting lawyers. One method of evading the prohibitions is to follow a specific description with an omnibus clause — "and all other matters connected therewith"; or even — "and for other purposes." The courts have not seen fit to frown on these general titles, and indeed it would be unfortunate if they did. The honest purpose of legislators — and far the greater part of their purpose is honest — ought not to be thwarted by quibbles.

Occasionally a palpable abuse of public confidence comes to grief. Thus in Attorney-General *v.* Plank Road Co., 97 Mich. 589 (1893), the court held an act unconstitutional when the legislative Journal up to date of the passage of the bill, but a few days before adjournment, gave no hint that such a bill was under consideration. The bill had been substituted long after the fifty-day limit, and the court said "certainly no one was bound to presume that provisions repealing a special act of incorporation,

taking away its power to hold property, and compelling a surrender of its property rights, were germane to a title providing for the purchase and sale, within prescribed limits, of rights of property of all corporations."

Taken as a whole, the net result of such constitutional provisions has been to deprive the legislator and the public of the value of really descriptive titles, without any compensating gain in the way of accuracy. If it were true that the courts insisted that the title should give a reasonable idea of the scope of the bill, benefit might be seen, but a moment's reflection will show the great difficulty in applying such a principle, and it is no wonder the courts do not attempt the strict application. Mr. Justice Agnew, in Dorsey's Appeal, 72 Pa. 192 (1872), drew the line wisely. "It would not do," he said, "to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult, and bring it into constant danger of being declared void; but on the other hand the title should be so certain as not to mislead." A reasonable attempt to formulate this view appears in the Louisiana Constitution of 1921, changing the requirement so that every law enacted "shall have a title indicative" of its object. This is a gain, and yet it would be far better to omit injunction altogether and leave the securing of the desirable result to that sense of pride in honest, accurate work which animates the great majority of public servants, and in the lack of which the prohibitions of a Constitution are of little avail.

Unrelated Subjects

Equally fruitful of trouble, though perhaps not equally vain, has been the attempt to confine laws to one subject or related subjects. The history of this goes back to ancient times. In the earliest days of recorded laws, they took the form of short, detached sentences; for example, the Ten Commandments. As the social relations became more complex, the laws necessarily departed from simplicity. At the same time the makers of law became more crafty and learned how to carry a doubtful proposal by harnessing it up with one more favored. This device for compelling the people to choose between voting for something they did not approve or rejecting something they did approve became so mischievous in Rome by the year 98 B.C. that the *Lex Cœcilia Didia* was enacted, forbidding the proposal of what was known as a *lex satura;* that is, a law containing unrelated provisions.

Few laws have ever been instrumental in producing more momentous results, for the application of this one led almost directly to the greatest upheaval that Roman history records — the Civil Wars, with the terrible contest between Sulla and Marius. It was in 91 B.C. that the tribune Marcus Livius Drusus the younger sought to purify the State by a group of reforms — the addition of three hundred members to the Senate, the taking of jurymen from the Senate instead of the equestrian order, the encouragement of emigration by devoting to that purpose the undistributed lands in Italy and the best part of Sicily, the granting of the franchise to the Italian allies. Submitted separately these laws could not have been secured, and so Drusus presented what we should call an omnibus bill, which, in spite of the vehement resistence of the capitalist party, became law. Thereupon the Consul Philippus, chief opponent of Drusus, demanded that the Senate should declare it null as in violation of the *Lex Cœcilia Didia*. After a stormy session the Senate decreed the abrogation of the law, two months later Drusus was murdered, and then came the insurrection of the Italian allies that might have been avoided if the promise of the franchise which Drusus made to them had been carried out by his law that was annulled. This in turn led to the struggle between Marius and Sulla.

In the colonial assemblies of America the obnoxious practice became familiar. In part this may have been due to unfamiliarity with the canons of correct law-drafting, for the assemblies of that time contained few members trained in the science of the law. Very likely it was indifference or carelessness that permitted the passage of such a bill, for example, as one in Virginia to prevent hogs and goats from running at large in the streets of Suffolk, and at the same time gave the town permission to hold a fair — not an uncommon instance of incongruity.[1] There is, however, good ground for suspicion that most of the mischief was deliberately planned, in order to compel the home authorities to approve dubious items attached to proposals evidently desirable and important. As early as 1695 we find the Committee of the Privy Council complaining that divers acts of Massachusetts were "joined together under ye same title, whereby it has been necessary for the repealing of such of them as have not been thought fit to be confirmed to vacate such others as have been comprehended under such titles." So the Privy Council forbade

[1] E. I. Miller, *The Legislature of the Province of Virginia*, 111.

this practice by a standing order to the Governors. One of them, Lord Cornbury, tempered the prohibition discreetly when he addressed the first Assembly of the united East and West Jersey, contenting himself with the mild recommendation "that each different matter may be enacted by a different law, to avoid confusion."

With the quarrels of the period leading up to the Revolution, the colonists resorted to the practice with provoking frequency and boldness. In 1758 it furnished occasion for instructions to another New Jersey Governor, Bernard, requiring him to see that intermixing did not take place. In 1760 the Board of Trade complained that a Pennsylvania law about issuing bills of credit included a loan to Colonel Hunter with which it had not the least necessary relation. Instructions to Governor William Tryon of New York in 1771 were aimed at the same abuse.

It may be argued in defense of the colonists that the end justified the means, but surely that excuse cannot condone the shortcomings of the State Legislatures in resorting to the stratagem for the purpose usually of benefiting some part of the community at the expense of the rest. In other words, the practice became for the most part a resort of special interests. The product was described by the court in Walker *v.* Caldwell, 4 La. An. 298: "Important general principles were found placed in acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were sometimes included in the same statute with matters entirely foreign to them, the result of which was that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation of this chaotic mass was the object of the constitutional provision under consideration." In People *v.* Mahaney, 13 Mich. 494 (1865), the practice was castigated as "corruptive of the Legislature and dangerous to the State."

For a striking illustration of what was taking place may be cited the important Pennsylvania law of 1848 in regard to the rights of married women. Its provisions formed part of an act in regard to five different matters, including the settlement of affairs in Le Raysville Phalanx, and the extension of the boundaries of Ligonier.

Although the Legislatures themselves ought to have reformed their ways, and some of them so did, others were unequal to their

duty and the coercion of constitutional mandates had to be invoked. New Jersey began (1844) coupling the requirement for unity with that about the title, and all the other States speaking of titles have proceeded in the same way, except Mississippi, which by the use of the plural, "or matters," in saying what the title ought to indicate, and by omitting any prohibition of intermixture, clearly implied that different topics might be treated in the same bill if so disclosed by the title.

The common phraseology is that the bill shall not "contain" (sometimes "embrace") "more than one subject." Perhaps our language does not permit more accurate statement of what is meant, but if so, that is unfortunate. A moment's reflection will suggest the trouble invited. Said a Delaware court: "Matters which constitute, apparently, two distinct and separate subjects, are not so, in the meaning of the constitutional provision, unless they are incongruous and diverse to each other." [1] Who can travel surely through the borderland between congruity and incongruity? Of course the purpose is not to prevent the incorporation in the same statute of separate provisions germane to the same general purpose, but anybody familiar with the history of parliamentary law knows the difficulty of applying that word "germane." The Ohio courts have wisely escaped the issue by holding the provision to be directory, which puts the responsibility on the Legislature. There indeed it belongs and it was a sorry day when attempt began to transfer it to the courts. That was jumping out of the frying-pan into the fire. As with titles, it is a problem that ought to be left to the self-respect of lawmakers.

The fact is that self-interest would often encourage their self-respect. It is generally poor strategy to combine unrelated proposals, for combined opposition is more formidable than combined support. The negative is usually more earnest than the affirmative. Men "bitterly" oppose. Did you ever hear of anybody "bitterly" favoring? That is why every section added to a bill, even though quite germane, increases the chances of defeat. Each additional detail stirs up somebody. Worse still if the provisions are unrelated. An historic instance of this was Henry Clay's famous Compromise of 1850, defeated as an Omnibus Bill because it contained so many incongruous matters. Then all the measures recommended by the committee were passed as separate bills, though less than a third of the members of the

[1] Clendaniel *v.* Conrad *et al.*, 26 Del. 549, 571 (1912).

committee had favored all of them, and only eighteen Senators voted for them all as passed.

Change by Reference

Another of the offenses in the matter of technique that brought to the legislation of colonial days the criticism of the home authorities was the habit of continuing or changing laws by reference. That is to say, if a statute was to be amended, it would in the amending act be cited by its title and not set forth in full. Governor Bernard, of New Jersey, in 1758, Governor Tryon, of New York, in 1771, and very likely other Governors were instructed not to permit that sort of thing. It was a tempting practice, saving many words and much time. Moreover, it did not particularly lend itself to the schemes of designing men. Yet it was dangerous and harmful, as the experience of the State Legislatures presently developed. Amendatory statutes were couched in terms so blind that legislators themselves were deceived in regard to the effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. The careless were misled. The laws themselves were threatened with endless confusion.

Here, too, delinquent Legislatures ought to have reformed themselves. Their neglect to act drove the anxious to constitutional mandate. Louisiana led the way in 1845 by saying: "No law shall be revised or amended by reference to its title; but in such case, the act revised, or section amended, shall be reënacted and published at length." The idea met with speedy favor. California took up with it in 1849, Virginia and Michigan in 1850, Maryland, Ohio, and Indiana in 1851, and in one form or another it now appears in nearly two thirds of the Constitutions.

New York varied from the usual phraseology by adopting, in 1874, this amendment: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." What this means has always been a puzzle. When originally presented, it appears to have had no debate, and apparently it went into the organic law without serious examination. The result has been that it has had little or no value. Judge O'Brien admirably criticized it in People *ex rel.* Everson,

135 N.Y. 285 (1892). "A provision of the fundamental law," he said, "which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and it is at best of very doubtful utility. . . . An attempt to prescribe the language or the forms to be used or observed by the Legislature in the enactment of statutes must inevitably result, either in the condemnation of numerous legislative acts, perfectly wholesome and just, or in the liberal exercise by the courts of their undoubted powers to give all laws a just and rational construction and meaning." As Ernst Freund has pointed out, it is clear that the section if literally construed would make all referential legislation impossible. This could not have been the intent of the framers, and we are left to guess what they did mean. There is hardly a provision to be found in any American State constitution, Freund thinks, which so strikingly illustrates the thoughtlessness with which clauses are adopted, and, once adopted, are perpetuated in successive Constitutions.[1] Fortunately only New Jersey (1875) has copied the New York language.

It is a subject fraught with perplexities. Lawyers justly complain of the ever-growing difficulty in finding out what is the law. Yet it would be intolerable to set forth at full length the context of every change. Often that would be wholly useless. When raising the pay of jurors to five dollars a day, why repeat the statute about jurors? Why even say, "instead of three dollars as heretofore provided"? Why waste ink by so much as declaring that "all acts and parts of acts inconsistent herewith are hereby repealed"? Of course they are. It is elementary that the last word goes. On the other hand there are changes with a bearing no man can fathom unless he sees the thing that is changed. After all, must the form not be a question of good judgment?

Resolutions and Resolves

The terminology of lawmaking has been made of consequence by written Constitutions. When they stipulate that a specified thing shall be done in a specified way, it is just as important to know what is the thing as to know what is the way. Disregard of either may vitiate the result. The conspicuous need of accurate definition has been in the case of "resolutions" or "resolves," for in them centers the controversy as to what the legislative

[1] *Proceedings*, Am. Acad. of Pol. Science, v, 106.

branch can do by itself, without any share by the executive. This controversy is likely to quicken whenever the two branches of government get at odds. It flamed when the Long Parliament sought to find how it could legislate without the consent of Charles I. The antiquary, D'Ewes, referring to an ancient precedent that did not support his position, boldly declared the Commons had the right to pass laws in the form of "ordinances" without the consent of the Crown. The suggestion was applauded, and almost invariably in the course of the Great Rebellion, until the abolition of the office of King, Parliament legislated by ordinance.[1]

Coke had said that the difference between an act and an ordinance was, "for that the ordinance wanteth the three-fold consent [of Lords, Commons, and Crown], and is ordained by one or two of them." This threw no light on validity, and even as description was not undisputed, for some said an ordinance was in the nature of a declaration by the Crown in answer to a petition of the Commons, on a question as to the law applicable to a given case, while a statute was an enactment of new law. Others brought the Commons to the front by describing an ordinance as a temporary act, not introducing any new law, but founded on acts formerly made, whereas an act was a perpetual law not to be altered but by Commons, Lords, and Crown.

The probability is that an ordinance was originally an executive command in the nature of a regulation, and that in the course of time its characteristics as a minor matter, usually temporary, came to predominate. In its downward progress it has reached in our day the status of fitting description for the regulations of municipalities. When our first Constitutions were written, however, it still had dignity. For example, the General Court of Massachusetts was empowered "to make, *ordain*, and establish, all manner of wholesome and reasonable orders, laws, statutes, and *ordinances*." Pennsylvania did "*ordain*, declare, and establish" its Declaration of Rights and Frame of Government. "Ordain" seems to have been the customary word of command.

Another word, "resolution," was beginning to compete with "ordinance." Both were used by the Continental Congress and by Congress under the Confederation. From the well-known "Ordinance of 1787" it might be surmised that "ordinance" was found convenient for what we now know as special legislation.

[1] Roger Foster, *Commentaries on the Constitution of the United States*, I, 100.

"Resolution" or "resolve" won favor, at least for a time, as the designation of minor, inferior, perhaps temporary law. In Pennsylvania it was applied to what was genuine law, for the purpose of evading the Constitution. The authors of that document, doubtless at the instigation of Benjamin Franklin, had declared that all bills of a general nature should be printed for the consideration of the people, before they were read in the Assembly the last time for debate or amendment; and, except on occasions of sudden necessity, should not be passed into laws until the next session. To avoid printing and delay, resort was had to legislation by resolves, and of this the Council of Censors complained as a violation of the Constitution. Among the measures thus enacted was that giving assent to the congressional scheme of 1783 for changing the mode of assessing quotas, certainly not a minor regulation.

Doubtless this was in mind when the Federal Constitution was made to read: "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States." It was James Madison who brought the desirability of this to the attention of the Convention, observing that if the negative of the President were confined to bills, it would be evaded by acts under the form and name of resolutions, votes, etc. After what Madison described as a short and rather confused conversation on the subject, the Convention voted him down, eight States to three, but the next day a new draft made by Randolph had better fortune, being adopted by nine States to one, in spite of Sherman's expressed belief that it was not necessary.

It would naturally be supposed that this clause meant what it said. That appears to have been assumed at the outset, for in the early days of Congress the President approved simple resolutions as well as bills and joint resolutions. As late as when John C. Calhoun presided over the Senate, the question rose over a resolution coming from the House for the appointment of a Joint Library Committee. Calhoun stated to the Senate that he entertained doubts as to whether this ought not to be laid before the President for his approval, but the Senate held that unnecessary. The fact was that the absurdity of the procedure for certain kinds of resolutions had become apparent, and legal acumen, brought to the relief of common sense, had shown a way out of

the difficulty by suggesting that the clause in question must be construed in connection with the rest of the Constitution, the contemplation evidently being that it was the exercise of legislative powers which should be subject to the Presidential scrutiny. Certain resolutions are not legislative in their nature. Indeed it would be much better if anything legislative were never called a resolution.

Jefferson in his "Manual" (sec. 21) made a wise distinction by saying that when the House commands, it is by an "order"; but facts, principles, and their own opinions and purposes are expressed in the form of resolutions. Yet nowhere, so far as I have observed, are resolutions thus restricted in practice. For example, Massachusetts, which with New Hampshire has preferred to say "resolve" rather than "resolution" (the two words having the same significance), and which from the outset (1780) has provided that "bills and resolves" are to go before the Governor, uses "resolve" both for opinion and command. The opinions thus treated are chiefly to the effect that money shall be spent. A typical opinion-resolve begins: "Resolved, That there be allowed and paid out of the treasury of the Commonwealth to the trustees," etc. In effect the word "should" is understood — "Resolved, That there (should) be" — for the resolve by itself does not accomplish the payment of the money. It is an expression of a purpose which is accomplished later in the session by the passage of an appropriation act containing the item in question.

The command-resolves in Massachusetts are for the most part orders for investigations, surveys, extensions of time, and like matters of a temporary nature.

Congress has made an awkward and cumbersome distinction by developing two classes of resolutions: the "concurrent resolution" for agreements of the two Houses not legislative in nature and therefore not going to the President; and "joint resolutions," which are really bills and in procedure are treated like bills. Opinion as to what a joint resolution might include has changed from time to time. In 1846 George Ashmun questioned a resolution because it contained an appropriation, but it was shown that money had frequently been appropriated by joint resolution. Linn Boyd and John Quincy Adams agreed that this was unwise. In 1871 Hannibal Hamlin declared the joint resolution a modern invention, and asked why we should have our statutes encumbered with legislation headed by different modes

of enactment. Charles Sumner agreed with him, and thought the sooner the system be dispensed with, the better. That same year in the House James G. Blaine and James A. Garfield found fault with the system. However, it persists.

The variations in the State Constitutions show how hard it has been to get agreement as to the wise course for handling the matter. New York's form of the veto (1777) exposed to the scrutiny of the Council of Revision "all bills about to be passed into laws." The Massachusetts form (1780) included "bills and resolves." Pennsylvania, adopting the veto in 1790, copied from the Federal Constitution the clause — "every order, resolution, or vote," and so did Kentucky two years later; but New Hampshire, also acting in 1792, and providing two sections for the veto, devoted one to "every bill" and the other to "every resolve." Louisiana (1812) followed Kentucky. Maine, set off from Massachusetts, naturally imitated the Constitution of the mother State; but in this particular changed "resolve" to "resolution," and improved on the original by adding, "having the force of law." Missouri (1820), taking the Federal model, also made improvement, by omitting "order" and "vote." New York did better still, in 1821, by restricting the veto to bills. Michigan (1835) copied Missouri, but Arkansas (1836) omitted only "vote," retaining "order." Florida (1838) took all three — "order, resolution, or vote" — thirty years later dropping the whole section. Texas took all three in 1845.

Then came New York, in 1846, with the most sensible proviso yet — "No law shall be enacted except by bill." About half the States now say that, with slight verbal changes here and there. Ten of them, however, have thereby added to the confusion because they have retained the requirement that resolutions shall go to the Governor, eight of the ten making the same requirement for "votes" and for "orders." One of the ten, Kansas, couples only "joint" resolutions with bills. South Carolina (which is not of the ten) also couples "joint" resolutions with bills in its veto section.

Most of the States that send resolutions to the Governor make exception of questions of adjournment. Louisiana excepts matters of parliamentary proceeding; half a dozen except those relating to the business of the Houses. Missouri has deemed it necessary to declare in the Constitution that no resolution shall have the effect to repeal, extend, alter, or amend any law.

The argument for differentiation in Congress or Legislature is that the statute books ought not to be encumbered with measures of temporary and passing consequence. It is said these may better be separately published and be discarded when they have served their purpose. To this the rejoinder is that anyhow they are printed between the same covers with the acts, and unless you tear them out, there they are until the Blue Books, or whatever they may be called, are replaced by the periodical codification or revision of the statutes. Experience proves that permanent provisions do sometimes get into them, and that the lawyer who does not consult them is not safe, at least in some jurisdictions.

Effect of Requirements

Style and procedural requirements have not made the laws of the States setting them forth any better than those of the States that leave the matter to the good sense and self-respect of the legislators. Of course nobody can say whether or not by formulation there would have been improvement in the States that have not put them in their Constitutions. On the other hand, it is beyond question that they have led to a distressing amount of litigation and have brought about the nullification of what might have been useful statutes. Although the courts lean toward liberal construction, there have been enough technical and narrow decisions to make draftsmen over-cautious, even to the point of increasing some of the very evils the requirements were meant to check. If these requirements are to be retained, some attempt should be made to lessen their harm. To this end Ernst Freund has made certain suggestions that seem to me admirable and practicable. The first is that the validity of a statute shall not, by reason of the alleged violation of any of these provisions, be allowed to be questioned in any action begun later than a brief stated period either after the expiration of the session of the Legislature or after the act has taken effect. Since an ordinary legitimate cause of action may not arise within the prescribed period, the provision might well be accompanied by another provision to the effect that such a statute may be impeached in a direct proceeding brought for that purpose by any citizen or any other party affected by the act (conceivably not a citizen), the Attorney-General being notified and having a right to intervene. The provision of a direct proceeding would merely give

regularity to the rapidly growing practice of instituting suits for *quo warranto* or injunction against officials charged with administering an act for the mere purpose of testing its validity.

Even more beneficial, Freund thinks, might be a provision to the effect that no statute should be questioned in any event by reason of the alleged violation of a formal requirement in specific respects where prior to its approval the Attorney-General had given his written opinion to the effect that its form or the procedure of its enactment did not in those specific respects violate the constitutional requirements. The dangers against which the Constitution desires to guard in formal and procedural requirements are necessarily of a transitory or ephemeral nature, which by the lapse of time become substanceless. If interests are prejudiced by precipitate haste, surprise, or log-rolling, a reasonable chance is given them to attack the law. After that chance has been given and no one has availed himself of it, the violated constitutional provision becomes merely a technical loophole of escape from the law.[1]

Freund makes another interesting suggestion to the effect that the practice of legislation might be considerably harmonized, and its quality improved incidentally, by the enactment of general statutes (comparable to the English "clauses acts") dealing exclusively with subsidiary matters of administration, enforcement, operation, or interpretation, which are now taken care of as part of each particular piece of legislation; these statutes to be incorporated by reference into any legislation to which they may be applicable. In this way alone he thinks uniform administrative principles can be secured.[2]

Punctuation and Preambles

Punctuation does not form part of an English statute. An act is presumed to have passed as it was read, but in the United States, where a bill passes not as read, but as printed, it has been held that an enactment should be interpreted in the light of the punctuation (Tyrrell *v.* The Mayor, 159 New York 242 — 1899). The Massachusetts court laid down the English rule that punctuation is no part of a statute, in Cushing *v.* Worrick, 9 Gray 385 (1857), but later in several cases held that it might be resorted to

[1] "Adequate Legislative Powers," *The Revision of the State Constitution* (N.Y.), 107, 108 (1915).

[2] *Proceedings*, Academy of Political Science, v, 120 (1915).

as an aid in construction when it tended to throw light on the meaning. One of these cases, Commonwealth *v.* Kelley, 177 Mass. 221 (1900), led to dubbing a certain statute about intoxicating liquors the "semicolon law," because a semicolon helped to convince the court that an exception, permitting innholders to sell to guests on the Lord's Day, extended only to the nearest antecedent, and did not get by a semicolon cutting off that part of the sentence relating to sale between midnight and six o'clock in the morning.

American statutes are thought by some to be inferior to those of England partly because of this matter of punctuation. Probably they would be less open to criticism if their authors followed the example set by Lord Timothy Dexter, who put an array of commas, semicolons, and other punctuation marks at the end of his "Pickle for the Knowing Ones," and suggested that his readers might "pepper and salt" it as they pleased. His theory was that of Pennsylvania. There a bill is punctuated when introduced, but then for the use of the members is printed without any punctuation, and so it goes through Senate and House and is approved by the Governor. In the laws as published and as placed in the hands of the courts and the people, there is such punctuation as is inserted by the clerks in the office of the Secretary of the Commonwealth, but the courts pay it no attention. A committee of the Commission on Constitutional Amendment and Revision recommended in December, 1919, this new provision: "Every bill before final passage shall be punctuated with such punctuation as it is intended to contain." The committee thought that, with the people in mind, the laws should be punctuated as meant by the Legislature, and not according to the views of some clerk. It was objected that the change would give the punctuation consequence in court. "A man might be hung on a parenthesis or for the lack of it," observed Judge James Jay Gordon. It was also objected that punctuation hurriedly put in at the time of final passage would be the work of some committee clerk and that the present evil would be made worse. So the proposal was rejected.

Preambles are no longer in favor. The experience of Iowa with them is instructive. They became the fashion there about 1868 and in the next quarter of a century encumbered from fifteen to thirty per cent of the acts of each session. Then their use waned so that by 1913 they were prefixed to but four out of 319 general

acts and to four special appropriations out of twenty-four. Sixteen out of nineteen special acts, however, had them, and all but one of thirty-three legalizing acts. It would be to the advantage of technique if everywhere they should be abandoned. As in the case of punctuation marks, their legal significance is small and doubtful. In England the courts do not regard a preamble as true enough to govern their construction of other parts of an act, though for other purposes it has been held to be evidence of matter referred to therein.[1] Doubtless the same view would prevail in most of the American courts.

When Laws take Effect

Until comparatively recent days it was the English rule that, when an act did not provide to the contrary, it was to be taken to operate from the beginning of the session in which it was passed. Consequently, where the session was long, an act that did not receive the royal assent until near the close of the session might have the effect of rendering illegal an action committed many months previously and lawful when it was committed. This cause of palpable injustice was remedied by the statute 33 George III, s. 13, which provides that every act shall begin from the date of the royal assent to it, where no other date of beginning is provided. The Federal Constitution has no specific provision as to the time when a statute shall take effect, and an act of Congress is therefore deemed effectual and in force from the time of its approval by the President, unless otherwise provided. This is also the rule under State Constitutions having no specific provision on the subject.

The old writers say that the reason why an Act of Parliament requires no public notification to the country is because it is deemed to be made by the whole nation, so that every person is present at the making of it. Such a theory worked little hardship when new laws were comparatively few, and so it is not surprising that the early American Constitutions contained nothing on the subject. Mississippi appears to have been the first State to feel the need, providing in 1832 that "no law of a general nature, unless otherwise provided for, shall be enforced until sixty days after the passage thereof." Iowa was the next to act in the matter, specifying in her first Constitution (1846): "No law of the General Assembly shall take effect until the same be published and

[1] Arthur Symonds, *The Mechanics of Lawmaking*, 51.

circulated in the several counties of the State, by authority. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in the newspapers of the State." The last sentence was retained in the Constitution of 1857, but the rest of it was replaced by provision that laws "of a public nature" should take effect on the 4th of July following a regular session — ninety days after adjournment of a special session. Two years later Wisconsin said, "No general law shall be in force until published"; and Illinois required an interval of sixty days after the end of the session, save in case of emergency. Thereafter the idea made rapid headway, more than a score of other States putting it into their Constitutions in one form or another. Fifteen in all have so far chosen the ninety-day interval. Half a dozen do not permit laws to take effect until publication, and about a dozen others make constitutional provisions for publication. All the States with the time limit recognize in one way or another the possibility of emergencies and make exceptions for them. These have caused no end of subterfuge. Indeed they have come so near nullifying the purpose of the provisions as to make it doubtful whether these are worth while at all. At least one State has gone to the length of declaring every act an emergency, thus putting legislation on a level with the States where by statutes laws take effect on passage.

The polyglot nature of the population in certain parts of the country led to a few constitutional provisions for the use of other than the English language. In Colorado the laws were to be published in Spanish and German, as well as in English, until 1900. In Louisiana the Legislature may provide for the publication in French. New Mexico (1910) required that for twenty years all laws should be published in both English and Spanish. Certain Missouri charters are to be published in German, and likewise amendments proposed to the Constitution of Maryland. Four of the States, Illinois, Michigan, Louisiana, and California, stipulate that legislative proceedings shall be conducted in the English language only, and that their records shall be so preserved.

CHAPTER XXV

HELP FOR LAWMAKERS

Lawmakers are coming to realize that they need help. The ever-widening range of human knowledge, the ever-growing store of human experience, make it more and more prudent to have at command a copious supply of information. For this reason the library now takes a prominent place in the equipment of the law-making body. In this capacity it was at the start a mere collection of books, for the use of whoever might apply. James Madison as chairman of a committee reported a list of books "proper for the use of Congress," and advised their purchase. Certain authorities on international law, treaties, negotiations, and other questions of legislation were declared by the report to be absolutely indispensable, and it was averred that the want of them "was manifest in several Acts of Congress." Not, however, until 1801 was the Library of Congress established. It came into existence chiefly through the efforts of John Randolph, of Roanoke, author of the saying — "A good library is a statesman's workshop." By means of an appropriation of five thousand dollars the Library of Congress started with 212 folios, 164 quartos, 581 octavos, 7 duodecimos, and 9 magazines, according to the first catalogue. Now it has nearly three million books and pamphlets, and is one of the five great libraries of the world.

Libraries have likewise grown up beside the State Legislatures, many of them now important collections, some suitably housed, as at Albany, others still suffering from the lack of sympathetic treatment, but practically all of them making vigorous struggle to meet their great opportunities. For many years they were hampered by the theory common to all libraries of a public nature, that they were merely storage places in charge of custodians. Toward the end of the nineteenth century this theory began to give way to the notion that a librarian should be something more than a warehouse-man — that he should help. Of the State Librarians it was Melvil Dewey who, in 1890, first gave definite shape to a program of effort, by establishing a Reference Bureau in the library at Albany.

Eleven years later came the next big step in advance, taken by Wisconsin, with the credit belonging to Dr. Charles McCarthy, who developed the possibilities of help to legislators in a fashion that has stirred emulation in most of the other States of the Union. His theory was that statute law should be based upon the best experience of all mankind, and he set to work systematically to put this experience within the easy reach of every lawmaker. He organized the sources and supply of information to great advantage. More than that, he organized the methods of applying the information. In other words, he carried the work of the Reference Bureau into the actual making of the laws, on the technical side. His Bureau became charged with bill-drafting, and in the course of a decade so successfully met the responsibility that in one session it drew 1915 out of 2024 bills and resolutions. Other States copied the idea and now about one third of the total give to their Legislative Reference Bureaus a definite part in the framing of legislation. Whether this is the better method depends on certain general considerations about the writing of laws.

The End and the Means

Lawmaking involves two factors — first, the determination of the purpose, and secondly, the provision of a method to achieve that purpose; more pithily, the end and the means. It has been contended with much force that only one of these factors, the determination of the purpose, the end, should devolve upon Legislature, Congress, or Parliament. Thus John Stuart Mill in "Representative Government" (ch. v) emphatically declared that in legislation as well as administration the only task to which a legislative assembly can possibly be competent is not that of doing the work, but of causing it to be done; of determining to whom or what sort of people it shall be confided, and giving or withholding the national sanction to it when performed. In his "Autobiography" (p. 264) he returned to the idea, averring that there is a "distinction between the function of making laws, for which a numerous popular assembly is radically unfit, and that of getting good laws made, which is its proper duty and cannot be satisfactorily fulfilled by any other authority."

The theory is logical, but in practical application it would run afoul of the difficulty that the primary purpose of a law usually carries in its train several or many secondary purposes, and these

it may be important for the representative assembly to decide. For example, take old-age pensions. Having agreed to provide them, it is vital to determine whether the system shall be contributory or non-contributory; that is, whether those who may become pensioners shall separately pay part of the cost, or the cost shall all be met out of the public treasury. Indeed, willingness to adopt any system at all may depend on which system it is to be. The discussion of the means may be inextricably involved with the discussion of the end. The two may shade into each other so that in the twilight zone it is impossible to say which is means and which is end. Where they might be easily and wisely discriminated, still would remain blocking the path of reform the stubborn refusal of most assemblies to forego the exercise of petty power. It must be assumed that legislative bodies will continue to belittle themselves with a great mass of rule-making in the nature of administrative detail.

For these reasons it is unlikely that we shall in our time see any experiment with Mill's plan of having all the laws made by a small Commission. Yet the plan has enough significance to be worth understanding. He held that such a body would be one of the fundamental elements of any government fit for a high stage of civilization. It should not of itself have any power of *enacting* laws: it would only embody the element of intelligence in their construction; Parliament would represent that of will. No measure would become a law until expressly sanctioned by Parliament; and Parliament, or either House, would have the power, not only of rejecting, but of sending back a bill to the Commission for reconsideration or improvement. Either House might also exercise its initiative, by referring any subject to the Commission, with directions to prepare a law. Once framed, Parliament should have no power to alter the measure, but could only pass or reject it; or if it were partly disapproved, remit it to the Commission for reconsideration. An attractive program, is it not? So reasonable, indeed, in principle that although the precise thing Mill urged is not in sight, there need be no surprise or regret if on examination we find the current setting strongly in the direction of the end he had in view.

The lessons of the business and professional world are at work. It is an era of specialization and the subdivision of labor. The expert is coming into his own. Even some legislators are beginning to admit that no one man can do all things equally well.

There are those who grant that practice in cobbling, horseshoeing, carpentering, merchandizing, dentistry, architecture — any of the ordinary occupations — does not necessarily qualify a man to draft a law.

The framing of a statute is among the most difficult tasks that confront the intellect. "I will venture to affirm," said John Austin the jurist, "that what is commonly called the *technical* part of legislation is incomparably more difficult than what may be called the *ethical*. In other words, it is far easier to conceive justly what would be useful law than so to construct that same law that it may accomplish the design of the lawgiver." The task calls for mastery of language, lucidity of style, familiarity with technical significances, command of both constitutional and statutory law, logical capacity, unusual powers of foresight, and a knowledge of the field concerned that cannot be too extensive. Such qualifications are rarely combined in one man. It does not suffice that he shall excel in some of them. Even men as expert in certain particulars as the judges of the highest courts have through the lack of other capacities fallen far short of perfection in statute-drafting. For example, the law drawn up by Lord Ellenborough, after he had served as Lord Chancellor, to keep young men of fortune from granting annuities in their minority, to the ruin of their fortunes, had to be repealed on account of inaccuracy in wording. In further illustration of the difficulties involved, it may be recalled that in this instance the repealing statute has been explained by three subsequent acts.

Expert Aid

The dangers of law-drafting by the inexpert were self-evident in the days when representative assemblies began. Many of the nobles, most of the squires and burgesses, were illiterate and knew they were unfitted for such work. Furthermore, at the start the laws were granted by the King in response to petitions for redress of grievances, and it was natural that they should be drawn by one or more of the King's judges. When it began to be the custom to present to the King with the petition a draft of the bill desired, the share of the judges in the process dwindled, yet as late as the period after the Restoration, when they were still helping the House of Lords, not only in its judicial, but also in its legislative business, they were occasionally employed in drawing bills or clauses. Indeed, their availability as helpers

seems to have been so important as to give the upper House the advantage in initiative, for Lord Hardwicke, speaking on the Militia Bill in 1766, said: "In old times almost all the laws which were designed to be public Acts, and to continue as the standing laws of this Kingdom, were first moved for, drawn up, and passed in this House, where we have the learned judges always attending, and ready to give us their advice and assistance."

The growth of business and the development of ministerial responsibility in the fore part of the nineteenth century brought to the front the need of expert help in the preparation of Government bills, and in 1837 a barrister of experience was employed for that purpose. In 1869 Mr. Lowe, Chancellor of the Exchequer, reorganized the work by creating the office of Parliamentary Counsel to the Treasury. The Counsel and Assistant Counsel receive liberal salaries, with adequate treasury allowance for office expenses and the payment of such outside legal assistance as may be required, from barristers who are paid by fees in accordance with the amount of work done. The Parliamentary Counsel is responsible for the preparation of all Government bills. Also he reports in special cases referred to him by the Treasury, on bills brought in by private members, but except in the case of such references is in no way responsible for the preparation or criticism of such bills. The special instructions are usually given in cases where the Government, being favorably inclined to the principle of a private member's bill, promises to facilitate its passage on condition of his accepting the Government amendments. Sir H. S. Maine thought we should not go far wrong if we attributed four fifths of every legislative enactment by Parliament to the accomplished lawyer who holds this position.[1]

The amount of thought, time, and labor which in England is bestowed on the preparation of the more important Government measures before they emerge to the public view is not fully realized. Sir Courtenay Ilbert tells us that measures such as those which transformed the system of local government in the several parts of the United Kingdom are the result of months or even years of preliminary elaboration in the closet. For instance the archives of the Parliamentary Counsel's office show that the Local Government Act of 1888 was the outcome of labor that had extended over at least ten years.[2]

[1] *Popular Government*, 237.

[2] *Legislative Methods and Forms*, 227.

American progress in this field has been far behind that of England. Only within a few years has Congress been willing to spend any money on bill-drafting. Many of the administrative bills were and still are drawn in the Departments, by counsel presumed to be competent. Senators and Representatives, vain of their powers of authorship, resented the suggestion that they might not be qualified to write statutes. If they were too busy, why, their secretaries could easily attend to the task. So again and again they scorned the proposal of expert help. When at last an appropriation ran the gantlet, it was so niggardly that only a few of the more important committees could be served. As late as the spring of 1920 a fight on the floor of the House was necessary in order to hold what ground had been gained. At this writing the greater part of the members of the House do not know that they can have expert aid, for the bill-drafters, one for the Senate and one for the House, dare not invite any more work than that which now crowds their time.

The Legislatures have been more receptive to the idea. In fact at least one of them awoke to the need as early as 1691. In May of that year the Assembly of New York requested the Governor to appoint the Attorney-General or some other person to draft bills for the Assembly. This, however, was exceptional, if not unique. Whether our fathers were too self-satisfied, or too thrifty, or whatever the reason, outside help did not meet their favor. In New York more than two hundred years were to pass before the need was admitted. The situation became intolerable. Governor David B. Hill in his annual message, January 5, 1885, declaring the careless and imperfect manner in which bills are generally framed to be one of the greatest evils incident to the hasty methods of modern legislation, pointed out that in the course of the session of 1883 about forty-five bills, after final passage, were recalled from the Executive Chamber for necessary amendment and correction, and in 1884 there had been fifty such instances. Also much needed legislation was lost every year because of the large number of measures left in the hands of the Executive upon adjournment, so defective that they could not be properly approved, and with all opportunity for correction gone. He deplored the resultant waste of time and attention of both Legislature and Executive, together with the very serious burden and responsibility imposed upon the Executive.

Out of this state of affairs came the requirement by statute in

1893 that the Statutory Revision Commission, on request of either House of the Legislature, or of any committee, member, or officer thereof, should draft or revise bills, and render opinions as to the constitutionality, consistency, or other legal effect of proposed legislation. In the next eight years the Commission drafted, examined, and revised several thousand independent bills in addition to the regular revision work in which it was engaged. After the termination of the Commission, by an amendment of the legislative law the Temporary President of the Senate and the Speaker of the Assembly were authorized to appoint persons to draft bills and advise concerning their "consistency" or other effect of proposed legislation. Since then the Legislature has created a Legislative Bill-Drafting Commission, with liberal appropriation for its expenses. It is composed of two commissioners, who are charged with the duty of aiding in drafting legislation, giving advice as to constitutionality and other legal questions, making researches as to proposed legislation, and advising on matters of consolidation of the laws.

New York also has a commissioner charged with the duty of indexing the laws of the State, and also a commission for the promotion of uniform legislation in the United States. The Bureau of Municipal Research well observes that there is no reason why the promotion of uniform legislation and the indexing should be separated from the general work of the Bill-Drafting Commission. "In giving proper technical advice, that Commission must be entirely familiar with existing law and in a position to index it with more precision than an independent officer. The promotion of uniform legislation is not so remote from bill-drafting and legislative research that it requires separate organization and office equipment." [1]

California has proceeded along the same line. Its Legislative Counsel Bureau was established by a statute of 1913. An appointing board was provided, to consist of two members from the Senate and two members from the Assembly, and in neither House could the two members be of the same political party. The chief of the Bureau must be chosen without reference to party affiliations, and solely on the ground of fitness to perform the duties of his office. The term of office is four years. The salary is fixed by the appointing board.

In Pennsylvania, which established a Bureau in 1909, the

[1] *The Constitution and Government of the State of New York*, 68, 69 (May, 1915).

work has included both the drafting of bills and the gathering of information. Also the Bureau has prepared a list of laws or parts of laws that have become obsolete, has prepared compilations of various bodies of laws, and has presented to the Legislature codes on these subjects. Furthermore, the Director is made *ex-officio* adviser to the Legislature in matters of legislative procedure and parliamentary practice — a singular requirement in view of the combination of qualifications contemplated.

Indiana has worked out still another grouping of duties. Its Bureau, originally organized as a legislative reference department of the library, has developed into a distinct department under the direction of a board consisting of the Governor, the State Librarian, the Presidents of the two State universities, and an additional member appointed by the Governor. Besides research work for members and the drafting of bills, it has been called upon to coöperate in the conduct of various legislative investigations, to codify the laws administered by several of the State Departments, and to take charge of the stenographic force of the House of Representatives.

In Illinois, where the Bureau is also under the supervision of a Board of State officials, yet a different combination of tasks has been found, for besides the usual collecting of data and drafting of bills, it has charge of the recording of procedure during the session and the preparation of the State budget.

It is needless to enumerate other variations of the idea. The whole matter is in the experimental stage and changes come so rapidly that an attempt to schedule the situation of the moment would be quickly out of date. Evidently the Legislatures are feeling their way. For instance, New Jersey — which in 1914 directed the Attorney-General to appoint a competent counsellor-at-law as legislative adviser and bill examiner, with a salary of $1500 a year and to work during December, the session, and at such other times as President and Speaker might designate, to draw and examine bills and amendments — repealed the law in 1917. At first blush it would seem as if the Attorney-General's office is a fitting place in which to put such work, but perhaps some political factor was found to enter. Theoretically the law officer of a Commonwealth ought to be absolutely impartial, wholly free from political bias, but so long as in nearly all our States he is chosen as a partisan, and is commonly viewed as the personal adviser of a partisan Governor, probably it will prove

undesirable to entrust him with what ought to be a completely non-partisan responsibility. There is the further objection that the staff of an Attorney-General is likely to go out of office with him, particularly upon a change in party control, so that the assistant to whom bill-drafting might be assigned would almost never get that long and wide experience so desirable.

In Massachusetts the Attorneys-General have been reluctant to engage in this work. Mr. Malone had occasion in 1907 to say to the Legislature: "Strictly, it is not within the scope of the duties of the Attorney-General to draft proposed legislation, nor, indeed, to advise a committee of the Legislature except upon such bills as may be actually pending before it." He said he had drawn a certain bill "not only as a matter of courtesy, but because I desire to render to your committee such assistance as is in my power in safeguarding the interest of the Commonwealth." [1] Obnoxious partisanship is so little known in the administrative conduct of Massachusetts that nobody would expect bias if bill-drafting were to be put on its Attorney-General, and yet that would probably prove unwise. No administrative official is likely to approach novel problems of legislation with much sympathy, and the suppression of instinctive prejudice would be difficult.

Massachusetts has been gradually systematizing the method of handling the matter. First the services of the clerks of the Senate and House Committees on Bills in Third Reading were informally put at the command of members. In time these clerks came to draw many of the bills, though seldom those that were lengthy and complicated. The Senate took care to see that such measures as had passed one debatable stage should go through the hands of a lawyer expert in matters of draftsmanship. It was said of one who thus served for many years that no bill he approved was ever thrown out by the courts on the ground of unconstitutionality. Indeed, the Massachusetts record not only does credit to those who have had the particular duty of watchfulness, but also goes far toward confuting the hyperbolical critics who sweepingly chastise all American lawmaking. The figures show that up to and including part of 1916, the Massachusetts Supreme Court declared invalid on the ground of unconstitutionality two resolves and fifty-one acts or parts of acts. All but one of these were enacted after 1847, and in that period there were 28,921 acts and 6979 resolves, a total of 35,900, ex-

[1] *Opinions of the Attorney-General*, III, 112.

cluding the four great revisions of the general law. Thus the Supreme Court has declared invalid less than one seventh of one per cent of the proceedings.[1]

Nevertheless, even in Massachusetts the system has had its defects. Complete satisfaction with it was made impossible by the conditions. Bills often come along in such numbers that careful study is almost impossible. Furthermore, it is much wiser to start the process with a bill somewhere near correct than it is to rely on trying to redraft imperfect bills while in the works, so to speak. The Special Committee on Legislative Procedure that reported in 1915 was right in urging reform of the system. "Each act," it said, "should be carefully tested as to its harmony and coördination with existing law, to see whether it is a duplicate of any other law or is inconsistent with any, or does in another way what is already done in one way. The provisions of the act should be clearly adequate to its purpose without accomplishing something never intended. They should be studied with reference to economic, social, and business conditions of that part of society affected. With all this there should be brevity, simplicity of form, and freedom from ambiguity. If that is not a task for an expert we know of none. We pride ourselves on the care that committees now give to the drafting of important bills, yet even here in Massachusetts there is much that is enacted that is loose, slipshod, and subject to continual revision or interpretation either by the Legislature or by the courts." Appreciation of this was doubtless one of the causes that led the Legislature, at its special session in 1920 for considering the revision of the statutes, to enact a law directing the Committees on Rules of the Senate and House each to appoint "a skilled person to act as counsel to the Senate and House of Representatives, respectively." The two thus appointed will be kept busy when the General Court is not sitting, in bringing the general body of the statutes up to date, thus, it is hoped, avoiding the costly revision that has hitherto been necessary every twenty years or so. Salaries adequate to permit the appointment of counsel really expert have been provided.

South Carolina is unique in putting at the command of the General Assembly, by statute, not only the Attorney-General, but also the circuit solicitors. As many of these solicitors as the Attorney-General thinks necessary, are to attend the session of

[1] James M. Rosenthal, *Mass. Law Quarterly*, August, 1916.

the General Assembly, to assist the Attorney-General in drafting bills and in supervising their engrossment and enrollment. The Attorney-General himself is to "give his aid and advice in the arrangement and preparation of legislative documents and business."

Drafting in the Reference Library

The Massachusetts committee reporting in 1915, came out squarely against adopting the Wisconsin plan of having bills drafted by officials in the reference library. The committee believed, however, that though the reference library should be separate, it ought to be at the disposal of the drafting official as well as members of the Legislature — surely not a radical proposition. The anti-climax might be dismissed with a smile were it not for the fact that some who have given the subject much thought actually think that damage worth noting results from failure to coördinate the two functions. Thus J. P. Chamberlain, writing in "The Survey" (January 6, 1917), says that if the drafting and reference work are separated, as in New York, experience has shown that the reference division will not be used by the draftsman, and it is in danger of losing touch with the legislators and thus failing in practical value. "Where there is no drafting service a reference library may become invaluable to members in gathering information; but if there is a drafting service to which they can go for finished bills and trained legal advice, there is danger that the reference work, if separate, will fail of its purpose. A principal object of the reference division is, besides, the gathering of material to respond to the needs of the draftsman; as a reform idea is being developed into a legislative idea and put into the shape of a bill, so the association between the two divisions should be clear." Yet why a man with brains enough to draw bills should refrain from using the library in case of need, or why a man with sense enough to be a librarian should make that use difficult, does not to me appear.

Indeed, I am not convinced that there is any reason why the library should have closer relations with bill-drafting than with any other governmental activity to which information may be helpful; and that the librarian should be charged with any responsibility in connection with bill-drafting seems to me quite incongruous. Drafting is primarily a lawyer's job. To be sure, not every lawyer can draw a bill, and few lawyers are expert at the

task, but the chances are strong that a lawyer will do it better than anybody else. There is no reason why a librarian should be a lawyer; on the contrary, he is more likely to be a good librarian if he has not given any time to the law or to any other profession than his own. In the matter of legislation his really important function is to collect and make available information upon issues, chiefly economic and social, out of which the Legislature is to evolve decisions as to policy. Thereupon begins the draftsman's task, to clothe the policy in language.

Even the Wisconsin system in its home application sharply draws the line, contrary to the common belief. Dr. McCarthy himself shows this in his book on "The Wisconsin Idea" (1912), where he gives the "Rules for the Drafting Room" that he found it necessary to apply. Two of these are:

"3. The draftsman can make no suggestions as to the contents of bills. Our work is merely *clerical* and *technical*. We cannot furnish *ideas*.

"4. We are not responsible for the *legality* or *constitutionality* of any measures. We are here to do *merely* as *directed*."

It is explained that the rules were laid down so that the draftsmen could not insert jokers in the bills. Is it pharisaical to express surprise and regret that there was occasion for such precaution? Granting the occasion, however, it would seem as if the remedy had taken most of the value out of the system itself. If the draftsman may not advise, if he is to be merely a mechanical formulator, surely the occupation can have little attraction for any lawyer ambitious to make himself of more than clerical use. It was all very well to demark the draftsman from the librarian, but why denature the draftsman?

Dr. McCarthy himself, in the same book (p. 222), seems to recognize that the draftsman should have worthier duties. "If our administration is to be good administration," he asks, "does it not seem ridiculous that the supreme courts — the highest legal talent in our State and Nation — should go on day after day, year after year, turning out decision after decision upon laws which are often made by men who have never seen a law book, and who have not had the slightest legal help extended to them? Does it seem right that our fundamental law should be left to these haphazard conditions? Does it seem reasonable that all the talent should be used in interpreting laws, in curing their defects, and that absolutely nothing should be done in a scientific

way to assist the man who makes them? The construction of the law is a far harder task than the criticism or even the interpretation of it. It involves the interpretation of it; it involves a knowledge of the theory of government, and because of the enlarged sphere of government to-day, a sound knowledge of economic conditions." And elsewhere he has said: "If private forces maintain bureaus of information for representatives, let us have public information bureaus, open to private and public interests alike. If it is hard to get information because of the great variety of subjects now coming before our legislators, the only sensible thing to do is to get experts to gather this material. If business interests have good lawyers to look after their legislation, the people should secure the same kind of men to help their representatives. If the business interests secure statisticians, engineers, and scientific men, then the public should do likewise. If great judges and great lawyers are constantly working upon the problem of interpretation of laws, then surely men of equal ability should be consulted while those laws are being constructed." [1]

If all this is sound — and so it seems to me — should not such a high order of legal ability as this would call for in a draftsman have full and free scope in its exercise?

As bearing on this point, contrast the duties of a Wisconsin draftsman with those devolving upon the English Parliamentary Counsel. In England not only is the most careful and thorough labor put into the bill in advance, but also, if the bill goes to a Committee of the Whole House or to one of the Grand Committees, the draftsman may be expected to attend the debate, and give such assistance as he can in the way of framing or modifying amendments, or meeting points. Where a bill is much amended in Committee, it will require minute examination after the Committee stage, for the purpose of seeing whether there are any errors to be removed, or alterations of consequence to be made; and amendments will have to be framed for insertion at a later stage. Notes will also have to be written on various points; and the literature which thus gathers round a bill often attains to formidable dimensions. Sir Courtenay Ilbert tells us that when a bill of great importance is in progress, it requires the constant and unremitting attention of the Parliamentary Counsel, to the exclusion of all other work.[2] In short, the Parliamentary Counsel is a genuine counsellor, as he ought to be.

[1] *Bulletin*, Wis. Leg. Dept., 1908. [2] *Legislative Methods and Forms*, 89.

Complete application of the English idea to our conditions would be impossible. The work of the Parliamentary Counsel is put into Government bills and these are important measures altogether likely to become law. Although we are beginning to have what are here called administration measures, to carry out the recommendations of the Executive, they as yet play a comparatively small part in the work of a session. Neither in the case of these nor in that of proposals submitted by departments is there anything like the probability of passage that prevails under the system of ministerial responsibility, which links the fate of the Government with the success of its measures. Likewise with us the career of bills submitted by either standing or special committees or by special commissions is precarious. Still more doubtful are the chances of the multitude of bills presented on individual initiative. Shall any line be drawn to relieve the draftsman of useless work, and if so, where?

It seems an enormous waste of energy to put costly legal talent into the great mass of measures that will never get a favorable committee report nor stand any chance of passage. For this reason there is not likely to be wide acceptance of the policy of the Wisconsin Senate, which began in 1907 the practice of having bills "reviewed" before introduction, the requirement being that Senators should submit their bills to the Joint Committee on Revision. This proving needlessly confusing and inconvenient, the rule was changed in 1911 to provide for offering bills for revision under a regular order of business for that purpose, and in 1913 further change was made so that bills are offered for revision by filing at the Clerk's desk at any time. The Revision Clerk is to return them within forty-eight hours, accompanied by written recommendations, which the Senator concerned may in his discretion accept or refuse. Such a system would, of course, be quite impracticable in Legislatures where many hundred measures are presented in the first fortnight or so of the session, under requirement that everything shall come in at the beginning. It would be absurd in Congress with its thousands and thousands of bills.

The Massachusetts Special Committee recognized the situation when it said in language having more color than that usually found in a public document: "We do not believe in organizing another department for the use of anybody who desires every sort of fool bill drafted." At the same time the Committee saw

the danger in letting any bill become law without having received the approval of a drafting official. It found that in almost every State it is not compulsory to submit the bills to him, but only voluntary, a method which the Committee thought "would seem to destroy the efficiency of the whole plan." So summary a judgment is not necessary, for every application of expert judgment is that much to the good, but the Committee was sound in urging that every bill reported by a committee should bear the official draftsman's endorsement of approval, and that every bill substituted for an adverse report should go to him for approval.

Preliminary Work

This, however, does not provide for the anticipatory preparation of serious and important measures that have some likelihood of passage. Direct selection of such measures for the official draftsman's help seems impracticable. Legislators would not permit preliminary sorting by any outsider, and I doubt if they would officially entrust it to any committee of their own number, though that has been suggested. Two methods of solving the problem appear to be in process of development. One is to be found in the tendency toward having a steering committee of the dominant party decide early in the session as to what important measures shall be made a program. The other inheres in the growing practice of having one legislative body determine in effect some of the matters that shall get the serious attention of the succeeding assembly, by the creation of special commissions or committees to investigate designated topics.

If the steering committee comes to be generally accepted, doubtless official draftsmen will confine what may be called preliminary effort to the measures that are to have the right of way. This will meet the disfavor of those who think that the drafting department should be absolutely non-partisan and free to every member. Evidently it will fail to ensure official scrutiny for those measures, however important, that become law although fathered by independent members or by members of the minority.

Preparation by commissions or by recess committees is less open to criticism. Such groups usually have in their membership men who are experts on the topics under consideration, and often they employ a secretary or counsel especially qualified to draft the legislation that may be recommended. Much is to be said for their employment of their own lawyers, for lawyers are be-

coming specialists as in the case of all the other professions. It is rare now to find a lawyer in general practice who can match in proficiency the experts obtainable in each and every field. So well is this coming to be understood that we may yet see even the standing committees of our legislative bodies permitted to retain the services of specialists in the fields with which they are concerned. Already to some extent committees of Congress employ counsel to perform services that might otherwise be expected from a drafting department. It has even been proposed that for the purposes of Congress a corps of experts should be organized, to be attached to the Congressional Library under the wing of a Legislative Reference Bureau, and to be ready to work out any problem presented. Such an ambitious project has no likelihood of acceptance, but it is not improbable that isolated problems may be put into the hands of just such a permanent body of expert advisers and preparers as we already have in theory in the Tariff Commission. The possibilities of such bodies, not only in the way of gathering information and making recommendations accompanied by expertly drawn bills, but also in the way of relief to overburdened legislative assemblies, are so suggestive that such experience as we have had in that direction deserves study.

When a scientific problem becomes an issue in partisan politics, it is not easy to reach conclusions that will not be suspected of bias. Perhaps, however, we are already far enough away from the Tariff Commission of 1909–13 to use it for instruction. Its Chairman was Henry C. Emery, who went to it from the chair of Political Economy at Yale, and whose training had been wholly that of an economist. If reliance cannot be placed on such deductions as he submitted to the American Economic Association in December, 1911, whose judgment can have weight? There he said:

> The question involves two points: first, whether such a body can actually secure information which will be adequate for carrying out a fair tariff policy for the benefit of the people at large; and, secondly, if this should be the case, whether or not, under our existing political system, such information can be made really effective and have a real influence on tariff legislation. I wish to say that my experience has convinced me that the answer to both of these questions should be an affirmative one. . . .
>
> The chief need of this country in tariff matters is to find some method

of securing the results in the way of quiet investigations which are secured in European countries through the continuous activity of permanent officials of the different governmental departments concerned in tariff legislation. Although important work has been done abroad by certain special commissions, the real advantage which these countries have over us is to be found in the fact that there are permanent officials attached to the Government departments who devote themselves solely to this problem, and who have been studying all the factors involved in tariff legislation for a generation. These men are, of course, not subject to any party control, and are not concerned with the success or failure of particular party policies. Furthermore, these officials have a most direct and, in many cases, a controlling influence on actual legislation.

The reason for the difference lies in the fact that they have the cabinet form of government, rather than government by legislative committees, as is the rule under American practice. It is the function of the Executive Cabinet to frame bills for the consideration of Parliament, and it is because of this fact that officials who permanently devote themselves to the study of tariff conditions can put their knowledge to effective use in framing the bills which are first introduced.

It is, of course, idle to consider at this point any radical change in the American form of government; but the question arises whether it is not possible and desirable to create some new body, be it called a board, a commission, or a bureau, which shall be competent to supply impartial and accurate information for the use of the legislative body.

Professor Emery went on to use for illustration the attempt to ascertain the difference in cost of production here and abroad, and expressed his conviction that it is possible, in the case of the most staple articles of manufacture, to determine the *ratio* of the costs between two different countries with accuracy enough for practical legislation.

I speak all the more strongly on this point because I was myself sceptical, at the outset of this work, of the possibility of getting such information. I expressed myself frankly to that effect at an earlier period, and my statements of that time have been frequently quoted since, to prove that work of this nature is entirely illusory. Those statements really prove that I was not sufficiently familiar with the problem at that time. . . .

It is a common belief that in a matter of such political significance as the tariff, non-partiality is impossible. In my opinion this belief is unduly cynical and pessimistic. Probably no schedule in the tariff is more involved than Schedule K, with the many complicated relations between raw material, intermediate products, and finished goods; and yet a Board composed of three Republicans and two Democrats has been

absolutely unanimous in its findings of fact in its investigations of this schedule. The individual members have different opinions as to what kind of tariff policy ought to be adopted on the basis of these facts. But such difference of opinion as to great economic principles has not in the slightest degree led to any disagreement as to what are the actual facts. As one of our Democratic members expressed it, "We all use the same multiplication table and the same yardstick."

I believe, then, that information of this character is of great value for tariff legislation, and that it can be secured impartially and with sufficient accuracy for practical purposes; and I am further convinced that such impartial analysis of the facts must in the end have an unquestionable influence on practical legislation.[1]

In England preliminary inquiries by a Royal Commission are found to be of inestimable service to the working of parliamentary government. A. Todd says that besides affording peculiar facilities for ascertaining facts, they frequently bring to light a mass of information upon the subject in hand which could be obtained in no other way; and the report of an able and impartial commission is often of the highest value in the instruction and enlightenment of the public mind.[2] A singular outcome of their work was noted by E. Chadwick, C.B., in an address before the Society for Promoting the Amendment of the Law, in 1859. "The questions of pauperism and poor-law administration, of crime and penal administration, of pestilence and sanitary legislation, and of the evils attendant on excessive manufacturing labor," he declared, "are conspicuous instances of the effects of commissions of inquiry in reversing every main principle, and almost every assumed chief elementary fact, on which the general public, parliamentary committees, and leading statesmen, were prepared to legislate." Although the man would be bold and probably extravagant who hazarded such an assertion about the work of American commissions nowadays, yet no student of the actual workings of our legislative assemblies can justly deny that the preliminary work of the commissions brings a vast deal of useful enlightenment and saves much error of judgment and folly of action.

Revision

Drafting and revision are of course distinct processes, but they are so confused both in theoretical discussion and in practical

[1] *Am. Economic Review*, supplement, March, 1912.
[2] *Parliamentary Govt. in England*, II, 93.

treatment that their consideration must overlap. The confusion begins with the first trace of them in the colonial records, where we find in the General Court of Massachusetts Bay June 2, 1641: "For the better entering of all orders of this Court, it is hearby ordained & established, that all orders of this Court which shalbee voted in any day of the same shall (before the Court arise that evening) bee referred to a committee of one or more, to bee put into dewe forme, & so presented to the Court the next morning." Who can say whether this provided for drafting a measure when the principle had been agreed upon, or for the work of what became in Massachusetts the Committee on Bills in Third Reading? Anyhow, it has from time immemorial in that State been the custom to have all bills thus revised in each branch between the first and second debatable stages. The Committees are among the most important and laborious in House or Senate. They have expert help, to be sure, but their responsibility is great, for almost complete reliance is put on them in matters of language, consistency, and accuracy. Changes not of substance that they make are seldom brought to notice unless it proves desirable to submit a wholly new draft, in which case the bill is reprinted. If they deem some change in substance desirable on the score of constitutionality, inconsistency, or any other ground, they may advise it themselves, or may call the point to the attention of the member in charge that he may move an amendment at the next stage. Normally they are allowed but forty-eight hours before they must report, too scant a time when bills tread on each other's heels, but the presiding officers are lenient in enforcing the rule. Occasionally, indeed, a bill will be quietly held in the hands of the Committee at the instigation of the presiding officer himself, or upon request of members interested, in order that some objection may be smoothed out or compromise reached.

The States vary greatly in their methods of handling this work, and the indications are that many of them have not yet systematized it to best advantage. The need of improvement seemed important enough to the New York Constitutional Commission of 1872 for it to recommend that counsel be provided for the Committees on Revision in each House. Evidently the situation was still unsatisfactory more than a score of years later, for the Commission to Recommend Changes in Methods of Legislation advised, in 1895, that Committees of Revision, both Senate and Assembly, should have their powers enlarged for the

consideration of all measures, both public and private or local, and that each of such committees should be assisted in its labors by a lawyer of at least two years' standing, with a salary adequate to ensure proper talent, and that he should have such assistants as might be necessary. These committees were to redraft bills when necessary, advise as to their effect, suggest as to their operation upon the general body of the law, and point out constitutional or other defects. The counsel should be appointed by the Governor, Lieutenant-Governor, and Speaker of the House, for a fixed term. The Commission also advised that general public measures should be referred before passage to the Commissioners to Revise the Statutes, to report upon the effect of such measures and their place in the body of the statute law.

Some idea of the slowness with which the States have attended to this important matter is to be gathered from the fact that as late as 1913 Governor Ernest Lister of Washington, had occasion to say in his inaugural address, it had occurred to him that the amount of needless litigation resulting from the ambiguous language of statutes might be minimized if the Legislature were to provide for the appointment of a committee, to consist of three persons, not members of the Legislature, whose duty it would be to check over and, if necessary, redraft bills before their consideration for final passage. He contemplated that such a committee should exist only during the legislative session. In Nebraska in 1915 the Speaker and Chief Clerk of the House and the Director of the Legislative Reference Bureau were made a committee to revise all bills, after first reading. With the consent of the authors, many of the bills were entirely rewritten with a view to securing greater clearness, brevity, and harmony with existing laws and legislative rules. Such a committee in the session of 1917 reported that out of 803 House bills 114 were found defective, or 14 per cent. Examination of the Senate bills, 331 in number, showed that 137, or 41 per cent, were defective.

Louisiana in 1921 decided the matter was of consequence enough to warrant constitutional provision, and so it directed that the Attorney-General, or his assistant, and two members of the Legislature, one to be selected by each House, should constitute a legislative bureau, to which all legislative matter intended to have the effect of law should be referred before advancement to third reading by the House where it did not originate, for examination and report as to construction, duplication,

legality, and constitutionality. The report is to be advisory only, but undoubtedly it will improve the quality of legislation.

From many directions come complaints that Governors discover large numbers of errors when bills reach them for approval. This is the more remarkable because it would seem as if, in case self-respect did not suffice to provide a reasonably thorough system of law-writing, self-interest would secure it, since every excuse given to a Governor for vetoing, by that much lessens the prestige of the legislative branch. Nevertheless, so dangerous it is for Governors to assume thoroughness and accuracy in the work of the Legislature, that they find independent examination against error absolutely necessary. Naturally they look to the Attorney-General for this, and in many States that official or one of his assistants studies every bill, particularly to make sure of constitutionality. This imposes such a burden on the Attorney-General's office, and occasionally brings such embarrassment by reason of partisan or personal friction, that it has been suggested the Governor ought to be empowered to employ personal counsel for such work.

Study from the lawyer's point of view does not meet the whole need. In many cases it is desirable that the administrative bearing of the proposed law shall get expert scrutiny. What can be more reasonable than that a measure relating to the field of any governmental department shall be reviewed by the man at its head to whom the people pay a salary for the very reason that he is presumably the best qualified and most competent man in matters relating thereto? Yet it is astonishing to find how indifferent, reluctant, or even hostile are many legislators in this matter of using the expert knowledge and opinion at their elbow. The New York Constitutional Commission of 1872 recommended that notice of a bill affecting a department be given to the head of the department, with an opportunity of being heard before the bill is passed. No constitutional provision to this end, however, has been made. More than that ought to be secured in every lawmaking body of the land, whether by constitutional provision, statute, legislative rule, or accepted practice. There should be a requirement, of either law or custom, that no committee shall report on any proposal relating to the field of any administrative department until that department has been required — not merely permitted, but required — to inform as to its bearing. It is the custom in Congress for committees to sub-

mit their measures to the executive departments, and the recommendations of the executive officer are usually respected. Legislatures ought to cultivate the same policy.

Ernst Freund has suggested that constitutional provision might well be made for securing that on the demand of the Governor, or of the presiding officer of either House, or of a stated proportion of members, a bill shall be referred for opinion and suggestion to any designated Bureau or Commission.[1] Personal experience in the shaping of bills involving administrative detail would lead me to go farther and make it mandatory that every measure relating to the State's business shall have the benefit of the State's experts.

The indifference and negligence of Congress in some of these matters astonish a member fresh from one of the Legislatures where revision is thought indispensable. From the time a bill is reported by a committee until it goes to the other branch, nobody gives the slightest attention to its technique, unless it be some member shocked by palpably bad grammar, or unable to make any sense out of a provision happening to catch his eye, in which case he may try to remedy by amendment offered from the floor. Only one consideration being given to a bill in the branch where it starts, further correction depends on the scrutiny of the committee to which it may be referred in the other branch, and as any change whatever will require return of the bill to the first branch for concurrence, with possibility of a committee of conference, the tendency is to pass over minor blemishes rather than invite trouble by insisting upon technical excellence. The practice is particularly unfortunate in the matter of substantial amendments. They may not be inserted in the most desirable place. They may be defective rhetorically. They may create inconsistencies. As a whole the system results in poor lawmaking, far from creditable to the body that in matters of this sort should maintain the highest standard and should set the example for the forty-eight other lawmaking bodies in the land.

The record of two consecutive sittings of the House in December of 1921 illustrates the danger in the present lack of precaution. On the 20th a member of the Committee on the Judiciary had to ask unanimous consent for the passage of a resolution amending an act of the previous session because all of certain

[1] "Adequate Legislative Powers," *The Revision of the State Const.* (N.Y.) 110 (1915).

language struck out by the Senate was not omitted from the enrolled copy of the bill, so that as the measure was signed and became law, it was contradictory in its terms. On the following day the President sent in a veto of a bill which through oversight had not given consideration to three statutes that would by implication be repealed, though manifestly such was not the intention. Each of these unfortunate episodes would almost certainly have been avoided under a reasonable system of scrutiny.

In England the problem of revision has not been so troublesome as with us, because the volume of legislation is far smaller than here. Yet that there is need of some method for lessening the defects in English statutes, may be gathered from Bryce's "Studies in History and Jurisprudence." He suggests (p. 739) that the remedy which seems least inconsistent with English parliamentary methods would be to refer each act, after it has passed both Houses, but before it receives the royal assent, to a small committee consisting of skilled draftsmen and of skilled members of both Houses, who shall revise the form and language of the act in such wise as, without in the least affecting its substance, to improve its arrangement and its phraseology, the act being formally submitted once more to both Houses before the royal assent is given, so as to prevent any suspicion that a change of substance has been made. "It is, however, unlikely that Parliament will consent to any proposal of this nature." Elsewhere (in "The American Commonwealth") Bryce observes that the harmony of one Government bill with others of the same session is secured by the care of the official draftsmen, as well as by the fact that all emanate from one and the same Ministry. No such safeguards exist in the case of private members' bills, but it is of course the duty of the Ministry to watch these legislative essays, and get Parliament to strike out of any one of them whatever is inconsistent with another measure passed or intended to be passed in the same session.

In theory the House of Lords is a revising body. Sir H. S. Maine said in 1885 that a measure "should in strictness pass through a searching discussion in the House of Lords; but this stage is becoming merely nominal; and the judgment on it of the Crown has long since become a form." [1] Presumably this refers to substance rather than technique, though both might be covered by any searching discussion. Since then this function of the

[1] *Popular Government*, 230.

Lords has somewhat revived, because with the veto power dwarfed, not much more than the field of revision remains.

In Switzerland the Federal Council has on its own authority corrected inaccuracies in point of drafting or form.

Correction and Improvement

Despite all the care of the legislators and their experts, the Governors and their counsel, errors are overlooked, the laws are defective, correction must follow. Furthermore, it is beyond the power of men to foresee all the results of new law, the unexpected happens, and the insufficient or ill-advised statute must be repaired. See what takes place even in such a State as Massachusetts, proud of her legislative proficiency. Tabulation for the Special Committee on Legislative Procedure showed that the Legislature of 1914 saw fit to change in some way sixty-six of its own Acts and 317 of those of the four preceding Legislatures. The Legislatures of five successive years averaged to change eighty-five Acts of the year before.

Such a record would not suggest that the need of change commonly escapes notice. Yet it has been held that the bettering calls for more than private initiative and that there should be at least an approach to systematic improvement. It was ostensibly for such a reason that Illinois put into her Constitution of 1870 this interesting provision (VI, 31): "All judges of courts of record, inferior to the Supreme Court, shall, on or before the first day of June of each year, report in writing to the judges of the Supreme Court such defects and omissions in the laws as their experience may suggest; and the judges of the Supreme Court shall, on or before the first day of January of each year, report in writing to the Governor such defects and omissions in the Constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws." According to a bulletin prepared in 1919 to aid the Constitutional Convention, this duty was in fact imposed largely as a means of justifying a further appropriation to supplement the salaries of the judges. The salaries of circuit judges had been fixed at a very low figure by the Constitution of 1848 and some subterfuge was desired as a basis for in effect raising them. So a statutory provision which had been of some effectiveness in connection with the revision of the statutes authorized in 1869 was embedded in the Constitution. It has been almost entirely

ineffective. Only once has a definite effort been made to bring it into operation. After several unsuccessful efforts to enact a primary election law that would stand the test of constitutionality, Governor Deneen asked the Supreme Court to redraft provisions that had been held unconstitutional and to correct other defects. The judges declined to comply, saying there was no obligation upon them so to do.

Nebraska in 1875 coupled reports from the judges of the Supreme Court as to defects with similar reports from the officers of the executive department and of all the public institutions of the State; directing that these reports should be transmitted to the Legislature. In the following year Colorado copied the Illinois provision, adding instruction for transmittal to the Legislature. Florida, Idaho, Washington, and Utah have, with variations, provided to like purpose. When California created its Legislative Counsel Bureau in 1913, careful provision was made for suggestion to it by judges of the Supreme Court, district courts of appeal, or superior courts, their ideas to be formally transmitted to the Bureau through the clerks of courts.

Chief Justice Arthur P. Rugg, of Massachusetts, delivered an address on this subject before the judicial section of the American Bar Association at Washington, October 14, 1914, taking the ground that it is repugnant to the fundamental conception of the judge under the American system of government that he should meddle with legislative matters. Instinctively it would be felt by the mass of the people, as well as by those keenly sensitive to a just administration of the law, he declared, that the members of the judiciary would be doing something alien to their duties and foreign to their office by becoming petitioners to another department of government. Manifestly it would be highly improper for the executive or legislative departments of government to request the judicial department to perform its duty in any given way. There seems to be a similar impropriety in the converse. It is impossible that the judge can continue to maintain a reputation for the possession of all judicial faculties or, in truth, really to possess them to a high degree, if in any respect he becomes either the advocate or the opponent of legislation. Any statute which a judge has framed or favored or opposed may come before him for interpretation or construction. The interruption of an argument by a Chief Justice of England with the words, "We understand the statute better than you do, for we

made it," illustrates the loss of judicial poise likely to follow from the judge being at the same time legislator.

The cogency of these arguments is evident. No one is likely to dispute the contention of Justice Rugg that the judiciary ought not to throw themselves into the arena of controversial discussion in matters of policy. Yet perhaps it is not presumptuous to wish he had not quite so summarily disposed of the suggestion that the judge knows better than any one else the defects of the law as to substance, form, and administration. Of this he disposes by saying that the position hardly can be substantiated. On the contrary, it seems to me that there are certain classes of defects which the judges might with advantage and without damage call to the attention of the legislative branch. Conspicuous among these are inconsistencies, ambiguities, and other purely technical matters. How can the dignity or independence of the judiciary suffer seriously from a formal report by the Chief Justice or a committee of judges calling attention to technical difficulties that have arisen since the preceding session of the Legislature?

Some of the Central and South American countries are less apprehensive than we are in this particular. Although in our conceit we may think we can learn little from them, yet experiments in political science are everywhere worth watching, and nations not over-hampered by traditions may work out something worthy our imitation. In Peru, Guatemala, San Domingo, Ecuador, Honduras, and Nicaragua the courts may take the initiative in the formation of bills upon judicial matters. In Salvador the Supreme Court is included among the authorized sources of legislative proposals upon any subject, but elsewhere in the Constitution there is an indication that the justices are to use this right only to introduce reforms necessary to cure imperfections or deficiencies in the existing law that they have noticed in the course of its application. In Colombia the judges are even privileged to be heard in debate on bills relating to civil matters or judicial procedure, and the same result appears to be attained in Salvador, Honduras, and Nicaragua by a provision that bills modifying or repealing any section of the codes or affecting the administration of justice shall not be passed until the opinion of the Supreme Court has been heard. In Salvador, however, the provision does not apply to laws of a political, economic, or administrative nature.[1]

[1] A. R. Ellingwood, *Departmental Coöperation in State Govt.*, 243, 244 (1918).

Codification

Everywhere and always appears a common belief that the body of the statute law might be greatly improved. The belief is nothing new, modern, decadent. In 1551 that precocious monarch, Edward VI, then a boy of fourteen, wrote as follows in his "Discourse on the Reformation of Abuses": "I have showed my opinion heretofore what statutes I think most necessary to be enacted this Session. Nevertheless, I would wish that beside them hereafter, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall much help to advance the profit of the Commonwealth." [1] But this, observes Bishop Burnet, was too great a design to be set on foot or finished under an infant king.[2] Something more than a century later the belief may be found cropping up again, this time in the "Diary" of Pepys under date of April 25, 1666: "I to the office, where Mr. Prin come to meet about the Chest business; and, till company come, did discourse with me a good while about the laws of England, telling me the main faults in them; and, among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort; and as he lives and Parliaments come, get them put into laws, and the other statutes repealed, and then it will be a short work to know the law."

Innumerable Mr. Prins have cherished the same ambition and boasted the same confidence.

Of course the trouble comes because the stream of laws is continuous. They never cease, and the reason is very simple — society never stands still. Change is the law of life, stagnation the principle of death.

With the laws ever accumulating, ever changing, convenience demands that at intervals they shall be codified, whether with or without revision. Our forefathers had not been settled in the Massachusetts Bay Colony a decade when they began to demand that their accumulated laws be properly set forth, with such additions as might be necessary to produce something in the nature of a Magna Carta. Their leaders staved off the demand for a time, but had to yield, and in 1641 came the first code of laws in

[1] *Literary Remains of Edward VI*, II, 486.
[2] *History of the Reformation in England*, II, 181.

New England, the "Body of Liberties," composed by Nathaniel Ward of Ipswich, a combination of Constitution and statutes. Three complete editions of the colonial laws were afterward published by authority, in 1649, 1660, and 1672. In these the new laws were not inserted in the order of their dates, as in the "Acts and Resolves" of to-day, but all existing provisions of law were consolidated and classed under appropriate titles arranged in alphabetical order. It will be seen that complete codification was practiced in New England from the beginning.

Even in those days there were carping critics, if we may infer from the delightful defense in the preface of the revision issued by the General Court in 1660: "If any shall complain of incongruous expressions or obscurity in some passages, let them be sure it be so, before they affirm it; Considering the Supreme Court (which ought to be honoured) hath perused them, and hath judged meet to publish them as they stand: Neither would time or their Honour permit them, as Criticks, to call every word to the Tryall before a Jury of Grammarians. Let it suffice that the meaning is intelligible, though the dress be not the most polished; nor is it necessary, seeing *mens Legis est Lex*."

It was about this time that John Locke, the author of the "Essay on the Human Understanding," conceived a new way to accomplish one of the purposes of revision, that of getting rid of obsolete statutes. "The Fundamental Constitutions of Carolina," framed by him in 1669 and amended by the Earl of Shaftesbury (Anthony Ashley Cooper) contained this section: "Seventy-nine. To avoid multiplicity of laws, which by degrees always change the right foundation of the original government, all acts of Parliament whatsoever, in whatsoever form passed or enacted, shall, at the end of a hundred years after their enacting, respectively cease and determine of themselves, and without any repeal become null and void, as if no such acts or laws had ever been made."

Undoubtedly from this the idea was copied by whoever framed the "Fundamental Constitutions" for East New Jersey (1683) and put into it: "For avoiding innumerable multitude of statutes, no act to be made by the great Council shall be in force above fifty years after it is enacted; but as it is then *de novo* confirmed." The scheme never had a fair trial. Locke's ideal was thrown overboard, and the proprietors of the Jerseys surrendered their powers to the Queen long before fifty years had elapsed after the passage of the first laws.

It is interesting to find the notion coming to the surface again, in the busy mind of Thomas Jefferson. It was not the technical phase of periodical revision that he emphasized, but a higher consideration that deserves reflection. Writing from Paris to James Madison in September of 1789, he discussed the question whether one generation of men has a right to bind another. By an ingenious train of reasoning, he satisfied himself that every Constitution and every law naturally expires at the end of nineteen years. "If it be enforced longer, it is an act of force and not of right. It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the Constitution or law had been expressly limited to nineteen years only. In the first place, this objection admits the right, in proposing an equivalent. But the power of repeal is not an equivalent. It might be, indeed, if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves; their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents; and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal." [1]

Jefferson persisted in his belief. In July, 1816, he wrote to Samuel Kercheval: "By the European tables of mortality, of the adults living at any one moment of time, a majority will be dead in about nineteen years. At the end of that period, then, a new majority is come into place; or, in other words, a new generation. Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the Constitution; so that it may be handed on, with periodical repairs from generation to generation, to the end of time, if anything human can so long endure." [2]

[1] *Writings of Thomas Jefferson*, P. L. Ford ed., v, 121.
[2] *Ibid.*, x, 43.

Although the views of Locke and Jefferson have never had the test of experiment, the argument is at any rate plausible. Certainly our statutes would be much smaller in bulk, much easier to remember, and honored with much more nearly complete observance, if the archaic, outgrown provisions were automatically eliminated by the passage of time.

The only approach to this appears in the periodical revisions made by some of the States, in the course of which sometimes obsolete provisions are dropped. Alabama appears to have been the first State to put into the Constitution a mandate for periodical codification of the statutes. At the outset (1819) she provided for promulgating a revision every ten years, changing in 1891 to every twelve years. Missouri, organizing the year after Alabama, copied the ten-year provision, Arkansas did likewise, in 1836, and Texas, in 1845. Michigan went in the opposite direction, by reason of unfortunate experiences with revisions made by men who undertook to frame a complete code and in the course of their work essentially revolutionized the law in some particulars, as well as entirely overlooked some important matters. Omissions and defects forced upon the Legislature the waste of much time in making corrections. So the Constitution of 1850 was made to say: "No general revision of the laws shall hereafter be made. When a reprint thereof becomes necessary, the Legislature in joint convention shall appoint a suitable person to collect together such acts and parts of acts as are in force, and, without alteration, arrange them under appropriate heads and titles. The law so arranged shall be submitted to two commissioners appointed by the Governor for examination, and if certified by them to be a correct compilation of all general laws in force, shall be printed in such manner as shall be prescribed by law." This was rewritten in 1908 so as to read: "No general revision of the laws shall hereafter be made. Whenever necessary, the Legislature shall by law provide for a compilation of the laws in force, arranged without alteration, under appropriate heads and titles. Such compilation shall be prepared under the direction of commissioners, appointed by the Governor, who may recommend to the Legislature the repeal of obsolete laws and shall examine the compilation and certify to its correctness. When so certified, the compilation shall be printed in such manner as shall be prescribed by law."

South Carolina, providing in 1868 for a revision of the laws

every ten years, in 1895 directed the appointment or election of a Commissioner to do the work and also to reduce into a systematic code the general statutes, including the Code of Civil Procedure, with report at intervals of not more than ten years. Also Oklahoma has by constitutional provision required the ten-year revision. Some of the older States have proceeded by way of statute. Thus in Massachusetts a codification has been made by legislative direction about every twenty years.

Congress has been exceedingly remiss in the matter. Not until 1845 did it decide to have an official publication of the laws of the United States. The laws then in force were put into one book and thereafter supplementary volumes appeared. President Lincoln, in his Message of December 3, 1861, urged the need of codification and revision. Since the organization of the government Congress had enacted some five thousand acts and joint resolutions, which filled more than six thousand closely printed pages and were scattered through many volumes. Many of these acts, declared Lincoln, had been drawn in haste and without sufficient caution, so that their provisions were often obscure in themselves, or in conflict with each other, or at least so doubtful as to render it very difficult for even the best-informed persons to ascertain precisely what the statute law really was. The President summed up the matter in words still relevant: "It seems to me very important that the statute laws should be made as plain and intelligible as possible, and be reduced to as small a compass as may consist with the fullness and precision of the will of the legislature and the perspicacity of its language. This, well done, would, I think, greatly facilitate the labors of those whose duty it is to assist in the administration of the laws, and would be a lasting benefit to the people by placing before them, in a more accessible and intelligible form, the laws which so deeply concern their interests and their duties."

Doubtless the preoccupations of the Civil War excused the failure to comply at once with Mr. Lincoln's advice. After the war a Committee on Revision of the Law was appointed and a commission put at work, but the task dragged, and not until 1874 were the Revised Statutes published. Four years later a second edition, brought up to date, was printed, but codification was not undertaken in earnest again for forty years. In the 66th Congress Edward C. Little, of Kansas, on becoming Chairman of the House Committee on Revision of the Laws, brought to the

work an interest and zeal that produced results, and at this writing it is hoped a new codification will soon be accepted by the two branches and appear in convenient shape.

F. J. Stimson found that of our fifty States and Territories, only sixteen have any official revision or "General Laws"; that is to say, one or more volumes containing the complete mass of legislation, up to the time of their issue, formally enacted by the Legislature. What are called "authorized revisions" or authorized editions of the laws, compilations never in form adopted by the Legislature itself, are found in twenty instances. In the fourteen others, the matter is left to the enterprise of private publishers, wholly or in part.[1] Stimson, whose familiarity with statute law is extensive, complains warmly and justly of the widespread negligence in this matter. He holds that all laws ought to be printed and published by a *State* publisher and the authenticity of all revisions be duly guaranteed by their being submitted to the Legislature and reënacted *en bloc*, as is the practice with revisions in Massachusetts and some other States. The local or private acts, he thinks, should be separated from the public laws, and might advantageously even be printed in a separate volume, as is done in some States already. He recognizes the difficulty of determining who shall decide whether a law is private, local, or special, and sees no other way than to leave it to the Legislature until permanent, preliminary, expert draftsmen are secured. To me the difficulty in discriminating seems so serious as to offset any gains in separating the laws into distinct volumes. Where even slight variance in judgment is possible, the prudent lawyer must look into both books, which lessens the saving of time that might be expected. Both books, too, must be kept on the shelves, at any rate until the next codification appears.

No issue can be taken with Mr. Stimson's final recommendation, that even if a revision is drawn up by an authorized commission its work should be afterward ratified by the Legislature. The reason given, that no legislation must ever be absolutely delegated, does not, however, appeal to me with so much force as may be found in the teachings of experience, which have shown that the most careful work of the ablest experts can benefit by the examination of such a large and varied body as a Legislature, with a very much wider range of knowledge and special interest than a Commission or a single revisor can command.

[1] *Popular Lawmaking*, 356.

The prevailing system of periodical revisions produces many inconveniences, or rather fails to obviate many to anything like the desirable extent. In the later years of the period between revisions it becomes an arduous and uncertain task to find out the state of the law on any given subject. Changes may be scattered through numerous bulky volumes. The indices abound in snares and pitfalls. Find if you can a place where the indexing art is more abused than in the books that are supposed to make it clear to men what are their rights and duties. Rare is the lawyer who can rise from a study of the statute books of a State other than his own with confidence that he has overlooked no vital provision, and even in the case of his own State he must be of more than ordinary experience and capacity to be sure of his ground. This is not the least of the reasons why there is so much grumbling about the Legislatures.

One remedy proposed is to have the revision continuous instead of periodical. Governor John D. Long, of Massachusetts, in his inaugural address of January, 1882, suggested that there should be a permanent officer — perhaps an assistant of the Attorney-General — to edit the General Laws of each session, and also to prepare from year to year, and keep on hand in manuscript, for use of the Legislature, just such a consolidation of the General Laws, with marginal notes and other details, as is now, at great cost and delay, made at long intervals. The special knowledge of such an officer would be of much value in preventing redundant or inconsistent legislation, and in securing a clear, concise, and uniform style in the drafting of statutes. "But his best service would be, that when, fifteen or twenty years hence, it shall become desirable to print and publish a revision of the statutes, that will be already done, and can be submitted at the beginning of any year for consideration or adoption by the Legislature in its regular session; thus, perhaps, avoiding the great expense of an extra session, as well as that of a special revision by special commissioners."

Before acting upon this advice Massachusetts paid twice again for the arduous and intricate labors of a Revision Commission, working with a corps of assistants for many months to straighten out the tangle, and for costly special sessions of the Legislature to ratify the product. Then, probably because the total cost of the revision of 1920 was so heavy, the Legislature passed a bill providing for continuous consolidation. By this the Committees

on Rules of Senate and House were directed each to appoint "a skilled person to act as counsel" to the Senate and House respectively, among whose duties should be that of consolidating and incorporating from time to time in the General Laws all new general statutes. Also they are to submit to the General Court such proposed changes and corrections in the General Statutes as they deem necessary or advisable.

Wisconsin in 1909 had sought to solve the problem in somewhat the same way by creating the office of Revisor (Laws 1909, c. 546), whose duties should be: (1) to maintain a loose-leaf system of the statutes, separating those statutes in force from those repealed or superseded; (2) to maintain a loose-leaf ledger of court decisions referring to statutes; (3) to present to the Committee on Revision of each House of the Legislature, at the beginning of each session, bills providing for such consolidation and revision as might be completed from time to time; (4) to keep an alphabetical, subject card-index to the statutes; (5) to formulate and prepare a definite plan for the order, classification, arrangement, and printing of the statutes and session laws; and (6) to supervise and attend to the preparation, printing, and binding of such compilations of particular portions of the statutes as might be ordered by the head of any department of the State. Apparently the detail of the program proved unsatisfactory, for by the time the 1917 revision of the laws appeared, there remained, if its index may be trusted, only directions to present to the Judiciary Committee at the beginning of each session plans and bills, with general authority to prepare the volume of "Wisconsin Statutes" (including the "Wisconsin Annotations") after each session.

THE END

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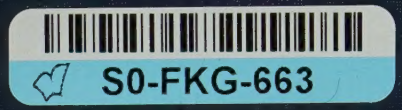
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